90-1620

Supreme Court, U.S.
FILED
APR 22 1991
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT PEARSON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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April 22, 1991

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QUESTIONS PRESENTED

The principal issue presented by this petition is whether the District of Columbia Court of Appeals erred in holding that 40 U.S.C. § 13k, a criminal statute which imposes a blanket ban on "processions" and "assemblages" on the grounds surrounding the Supreme Court, does not violate the First Amendment as applied to the plaza area in front of the Supreme Court building. The subsidiary issues are as follows:

1. Whether the plaza area in front of the Court is a public forum.

2. Whether a reviewing court may properly rely upon a content-based government interest in holding that a restriction on speech satisfies the narrow tailoring test, without also subjecting the restriction to the more demanding least-restrictive-alternative test.

3. Whether the court of appeals' attempt to cure the admitted overbreadth of Section 13k by limiting it to situations in which, among other things, its application would serve to "maintain[] proper order and decorum" or to "preserve the appearance of the Court as a body not swayed by external influence" renders this criminal statute unconstitutionally vague.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 15.1(b), petitioners state that the parties in the court below were:

Defendants/Appellants

Robert Pearson
Donna Cullinen
George Todd Krail
Joseph Salvatore Lopes
Robert Emmett Moran
Anthony Silna
Joseph Veltri
Norman Joseph Williams
Charles Radich

Plaintiff/Appellee

United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Robert Pearson, Donna Cullinen, George Todd Krail, Joseph Salvatore Lopes, Robert Emmett Moran, Anthony Silna, Joseph Veltri, Norman Joseph Williams, and Charles Radich ("petitioners") hereby petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a) is reported at 581 A.2d 347 (D.C. App. 1990). The opinion of the trial court below, *United States*

v. *Bridgett, et al.*, Nos. M1252-88 *et al.* (slip op. July 13, 1988) (App., *infra*, 26a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1990. Rehearing was denied on February 20, 1991. This Court has jurisdiction under 28 U.S.C. § 1257(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .

U.S. Const. amend. I.

Section 13k of Title 40 of the United States Code provides, in relevant part, that

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds . . . .

40 U.S.C. § 13k, ch. 479, § 6, 63 Stat. 617 (1949).

STATEMENT

In the course of upholding against a First Amendment challenge a statute restricting expression on this Court's property, the District of Columbia Court of Appeals has decided several issues that merit review by this Court. At

the outset, the court of appeals has held that the plaza in front of the Court's building is a nonpublic forum, and therefore that any restrictions on speech on that plaza need not be narrowly tailored to any significant government interests. In so holding, the court relied upon the Government's content-based interest in the statute without considering whether the restrictions imposed by that statute constituted the least restrictive means of pursuing that interest. Finally, the court below improperly has attempted to cure an obvious overbreadth problem in the statute at issue by adopting a "limiting construction" that makes the statute unconstitutionally vague.

1. Petitioners are nine individuals who were arrested for demonstrating on the Supreme Court plaza on January 22, 1988. The Supreme Court was not in session at the time of the demonstration. Although the Court normally would have been open for general business that day, the Court's Marshal had closed the building and most of the grounds to the public (with the exception of the press) because of a planned march by an anti-abortion group. Petitioners, who were members of that group, crossed a police line and entered the plaza area of the Supreme Court grounds, where they sought peacefully to express their opposition to the Supreme Court's abortion decisions through chants and public prayers.

2. Petitioners were arrested and charged with parading and assemblage on Supreme Court grounds, in violation of 40 U.S.C. § 13k.[1] Petitioners moved to dismiss the charges on the ground that Section 13k violates the First

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[1] 40 U.S.C. § 13k states:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to

Amendment. Petitioners advanced two alternative arguments. First, petitioners argued that the Supreme Court plaza is a public forum, and that Section 13k is not narrowly tailored to the government interests underlying it. Petitioners based their analysis of the plaza's public forum status on its physical similarity to other plazas and public grounds adjacent to national monuments that previously had been found to be traditional public forums. Second, petitioners argued that Section 13k violates the overbreadth doctrine because it applies to *all* "processions" or "assemblages" of any kind, regardless of how innocuous (*e.g.*, an "assemblage" of counsel to discuss an oral argument or a "procession" of visitors touring the Court).

The District of Columbia Superior Court denied the motion to dismiss, holding that this Court's decision in *United States* v. *Grace*, 461 U.S. 171 (1983), which deemed the sidewalks surrounding the Supreme Court to be a public forum, did not apply to the plaza above the sidewalks. App., *infra*, 30a-32a. The court reasoned that because the Supreme Court -- unlike the legislative and executive branches -- "does not decide its cases on the basis of public sentiment or opinion," permitting picketing and demonstrating on the Supreme Court grounds would undermine public confidence in the Court. App., *infra*, 34a-35a. The court also held that even if the Supreme Court plaza is a public forum, Section 13k is narrowly tailored to a significant government interest and therefore

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display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

The second clause, the so-called "display" clause, is not at issue here.

passes constitutional muster. App., *infra*, 37a-38a (citing *United States* v. *Wall*, 521 A.2d 1140 (D.C. App. 1987)).

With respect to petitioners' overbreadth claim, the Superior Court agreed with petitioners that Section 13k is overbroad as written:

> A narrower means would be to restrict expressive and protest activities which had as their object, and which required the participants to have the specific intent, to influence or intimidate a judge to make a particular decision. See, *e.g.*, 18 U.S.C. Section 1507. A regulation specifically limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice would be consistent with the principles enunciated by the Supreme Court in *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L. Ed. 487 (1965). *The regulation involved here is concededly far broader in its reach as is section 13k.*

App., *infra*, 39a-40a, note 12 (emphasis added).[2] The court held, however, that this overbreadth problem could be cured by a limiting construction. Section 13k, the court held, is "to be limited by and to [the] stated purposes" of (a) protecting the Supreme Court building and grounds and maintaining proper order and decorum; and (b) preserving the appearance of the Court as a body not swayed by external influence. App., *infra*, 42a-43a. The court did not demonstrate, however, how petitioners' actions had compromised any of these purposes, or what standards

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[2] The Superior Court was specifically addressing overbreadth as applied to Regulation Two, which is not being challenged in this petition. *See infra*, n.3. The court clearly indicated, however, that the same overbreadth analysis applied to 40 U.S.C. § 13k, the statute at issue in this case.

would apply in determining whether a violation had taken place in a particular case.[3]

3. The District of Columbia Court of Appeals affirmed, approving the Superior Court's decision in all respects. The court noted that the nature of the judicial process requires "public confidence in the integrity" of the Court and the avoidance of any appearance that the Supreme Court is susceptible to outside influence. App., *infra*, 10a. According to the court of appeals, the government's interest in "preserving the integrity of the judiciary" and preventing such an appearance of susceptibility to influence might be undermined if the plaza were used for expressive purposes. App., *infra*, 12a. In light of this interest in avoiding the appearance of influence, and because the plaza "traditionally" has not been available for activities "of similar character" to those engaged in by petitioners, the court held that the plaza was not a traditional public forum. App., *infra*, 11a-13a.

In holding that the Supreme Court plaza was a nonpublic forum, the court distinguished *Jeannette Rankin Brigade* v. *Chief of the Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (three judge court), *aff'd mem.*, 409 U.S. 972,

[3] Following the denial of their motions to dismiss, petitioners either entered conditional pleas of guilty or were convicted for violating Section 13k. Petitioners also were convicted in a separate count of unlawful entry in violation of Regulation Two, a regulation promulgated by the Marshal pursuant to 40 U.S.C. § 13*l*, which prohibits entry into any part of the Supreme Court building or grounds that has been closed by the Marshal. Petitioners received concurrent sentences of probation on both counts, but separate fines of ten dollars were imposed on each count, for a total of twenty dollars per person. In addition, Mr. Moran was required to perform twenty-five hours of community service. Petitioners are not challenging their conviction under Regulation Two.

(1972) which held that the U.S. Capitol grounds were a traditional public forum.[4] The *Jeannette Rankin Brigade* decision was distinguishable, according to the court, because of the different purposes of the respective building and grounds being regulated: "the primary purpose of the Capitol -- legislating -- is compatible with speech accessibility," App., *infra*, 9a-10a, note 12, while "speech restrictions in and around courthouse grounds [are justified by] the tradition of constitutional and legislative safeguards which guard the integrity of the judicial process and free it from outside influence as well as the appearance of such influence." App., *infra*, 11a.[5]

The court of appeals then held that Section 13k's restrictions on speech were reasonable and viewpoint neutral, and thus, the statute satisfied the constitutional standard applicable to nonpublic forums. App., *infra*, 12a (citing *United States* v. *Wall*, 521 A.2d 1140 (D.C. App. 1987)). Moreover, even if the plaza were a public forum, the court of appeals concluded that the restriction on speech

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[4] In *Jeannette Rankin Brigade*, the court held that 40 U.S.C. § 193g, which prohibited parading, standing or moving in processions or assemblages on the Capitol grounds, was void on its face on both First and Fifth Amendment grounds. Section 13k, the statute at issue in this case, was modeled upon and is virtually identical to Section 193g.

[5] In so holding, the court suggested that this Court's decision in *Grace* validated the distinction between speech in legislative and judicial settings. In *Grace*, the Court had held that the sidewalk on the Court's grounds was a traditional public forum, and thus that demonstrations held on the sidewalk were entitled to First Amendment protection. The Court rejected the argument that the Supreme Court sidewalk was different than the sidewalks in front of other public buildings because it was in front of a courthouse. *Grace*, 461 U.S. at 180, 182, 183. However, the Court left open the question whether the Supreme Court plaza and grounds are a public forum. *Id.* at 178.

imposed by Section 13k could be upheld as a "reasonable time, place or manner restriction" because it was narrowly tailored to serve the significant governmental interest in "preserving the integrity of the judiciary." App., *infra*, 12a-13a.

In relying on the articulated interest in "preserv[ing] the appearance of the [Supreme] Court as a body not swayed by external influence," App., *infra*, 20a, the court of appeals did not consider whether the content-based nature of this interest should have affected the First Amendment analysis. To the contrary, the court of appeals ignored petitioners' argument that the government's interest in protecting the Court's symbolic aura of freedom from influence necessarily was content-based, and that the government was therefore required to demonstrate that its total ban on demonstrations and symbolic speech was the least-restrictive-alternative. Appellants' Brief 12, note 7; Appellants' Reply Brief 8, 10; Petition for Rehearing 2-5.

Turning to the overbreadth challenge, the court of appeals conceded, as did the Superior Court, that:

> an absolute ban on any group activity is not supported by the government's legitimate and important interests in protecting the integrity of the Court, preventing the appearance of judicial bias, and safeguarding the Court grounds and personnel.

App., *infra*, 19a. The court then proceeded to apply a narrowing construction to the statute, confining the scope of the "processions and assemblages" clause to "protection of 'the [Supreme Court] building and grounds and of persons and property within, as well as the maintenance of proper order and decorum,'" and the preservation of "the appearance of the Court as a body not swayed by external

influence." App., *infra*, 20a. The court found that the "government concern underlying Section 13k" was "readily identifiable and aimed at two types of activity inimical to the Court's functions: demonstrations on Supreme Court grounds and use of those grounds as a forum for voicing private views." App., *infra*, 21a.

The court rejected petitioners' claim that this narrowing construction rendered the statute unconstitutionally vague. The court stated that the words "order," "decorum," and "dignity" are readily defined and "enjoy their common literal and political definitions." App., *infra*, 25a. Because the court found "no reason to believe" that the scope of its narrowing construction would not be "commonly and generally understood, particularly where the highest court of the land and the third branch of our government is involved," *id.*, the court rejected the argument that the narrowing construction of the overbroad statute rendered it void for vagueness. The court denied rehearing, without opinion, on February 20, 1991.

REASONS FOR GRANTING THE PETITION

This case presents three issues that merit review by this Court. The first is the question expressly left open in *United States* v. *Grace*, 461 U.S. 171, 178 (1983): whether the plaza area in front of this Court's building is a public forum. The court below has held that the plaza could not be deemed a traditional public forum because of the need to preserve the appearance of the Court as a body not swayed by external influence and because the record did not demonstrate that the plaza had "time out of mind . . . been used for purposes of assemblage, communicating thoughts . . . and discussing public questions." App., *infra*, 10a, (citing *Perry Education Association* v. *Perry Local*

Educator's Association, 460 U.S. 37, 45 (1983)). Such an analysis not only improperly relies upon the government's interest in restricting speech in determining the "public forum" status of the property, but also reflects a division among the lower courts with respect to the extent to which the physical and functional nature of public property affects its status as a traditional public forum. See, *e.g.*, *Smith* v. *County of Albemarle*, 895 F.2d 953, 959 (4th Cir.), *cert. denied*, 111 S.Ct. 74 (1990); *International Soc'y for Krishna Consciousness* v. *Lee*, 925 F.2d 576 (2nd Cir. 1991).

The second holding -- that Section 13k passes constitutional muster even if this Court's grounds are a public forum -- rests on the court's conclusion that the restriction on speech imposed by the statute is narrowly tailored to the government interest at stake. Yet, the government interest on which the court below principally relied -- "preserv[ing] the appearance of the Court as a body not swayed by external influence" -- is plainly content-based, and therefore the restriction of speech based upon that interest should have been required to meet "the most exacting scrutiny." The court of appeals' refusal to undertake a least-restrictive-alternative analysis in these circumstances conflicts in principle with this Court's decisions in *United States* v. *Eichman*, 110 S.Ct. 2404 (1990), *Texas* v. *Johnson*, 491 U.S. 397 (1989), and the decision of the Fourth Circuit in *Baugh* v. *Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 444 (4th Cir. 1990).

The third issue is whether the court of appeals' attempt to cure the admitted overbreadth of Section 13k by limiting the reach of the statute to situations in which its application would, among other things, serve to "maintain[] proper order and decorum" or to "preserve the appearance of the

Court as a body not swayed by external influence" renders this criminal statute unconstitutionally vague. The limitations articulated by the court simply are too imprecise to give persons "of common intelligence" sufficient notice of which processions or assemblages are permitted and which are proscribed. See *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971). The holding below therefore runs afoul of this Court's admonition in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 516 (1964), that an appropriate narrowing construction of an overbroad restriction on speech cannot substitute vagueness for overbreadth.

Finally, this case merits review by this Court for the simple reason that it involves the dispositive construction of one of the few statutes that regulates speech solely in the Court's own building and on its grounds. Here, as in *Grace*, this Court should not leave it to the lower courts to determine the appropriate standards of conduct and expression applicable to the grounds of this Court.

1. The court of appeals' holding that the Supreme Court plaza is a nonpublic forum rests on its conclusion that the "physical and functional attributes" of the plaza are "significant only to the extent that they reflect the use and purpose of the property." App., *infra*, 9a. Thus, the court's determination of whether the plaza constitutes a "public forum" "focus[ed] on whether the place has been devoted to assembly and debate, not whether the physical features of the Supreme Court are similar to other public forums." App., *infra*, 10a. Moreover, the court made clear that, in its view, the Supreme Court's "primary purpose" was not "consistent with" petitioner's "contention that the Supreme Court building and grounds comprise a public forum" -- "the effect of which would be to permit demonstrations on the Court's grounds." App., *infra*, 11a.

By considering the "purpose" of this Court (*i.e.*, the nature of the judicial function) in determining whether the plaza constituted a public forum, the court improperly injected consideration of the asserted interest in restricting speech -- "preserving the integrity of" and public confidence in the judiciary -- into its analysis of whether the plaza constituted a public forum. In relying on the interest in "preserving the integrity of the judiciary" and the absence of evidence of past history of the plaza as a forum for free expression -- rather than the similarity of the physical and functional attributes of the plaza to other quintessential public forums -- the decision below conflicts in principle with the decisions of various federal courts.

For example, in holding that the Capitol grounds are a traditional public forum, the court in *Jeannette Rankin Brigade*, 342 F. Supp. at 584, specifically rejected the notion that the Capitol grounds lacked a tradition of public accessibility sufficient to confer public forum status, citing the thousands of visitors touring the Capitol each year. The reliance of the court below on the absence of evidence of use of the Supreme Court plaza as a forum for demonstrations cannot be reconciled with the recognition of public forum status for the Capitol grounds in *Jeannette Rankin Brigade* -- despite the fact that the invalidated government statute had prevented demonstrations from taking place on the Capitol grounds in the past.[6]

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[6] *See also Frisby* v. *Schultz*, 487 U.S. 474 (1988) (a town's residential sidewalks could not avoid public forum status merely

Similarly, in *Smith* v. *County of Albemarle*, 895 F.2d 953, 959 (4th Cir.), *cert. denied*, 111 S.Ct. 74 (1990), the Fourth Circuit relied on the physical similarity of its courthouse exterior to other public forums in concluding that courthouse grounds can be a public forum, even though the location lacked a long history of usage as a public forum. The holding of the court below that the absence of historical evidence of demonstrations on the plaza (App., *infra*, 11a) outweighed the physical and functional similarity of the Supreme Court plaza to other public forum settings is difficult to square, not only with the *Smith* decision but with numerous decisions which place primary reliance on the fact that a park, plaza or "lawn in front of a seat of government," was "similar to other settings found to be a traditional public forum."[7] *Smith*, 895 F.2d at 959.

In terms of its physical and functional characteristics, the Supreme Court plaza is difficult to distinguish from other public grounds in our nation's capital that have been recognized as "public forums." The plaza -- like the rest of

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because the particular sidewalks had not been extensively used for picketing in the past). The holding in *Jeannette Rankin Brigade* is supported by the D.C. Circuit's recognition that the ability to demonstrate, protest or otherwise express controversial viewpoints in public places within the federal seat of government, the District of Columbia, is central to the freedom of speech protected by the First Amendment. Accordingly, the court held that the White House sidewalk, Lafayette Park and the ellipse constitute a unique situs for exercise of First Amendment rights and must be treated accordingly. *A Quaker Action Group* v. *Morton*, 516 F.2d 717 (D.C. Cir. 1975).

[7] This proposition finds support in many cases holding that areas in front of a seat of government have traditionally been considered public forums. *See Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Jeannette Rankin Brigade* v. *Chief of the Capitol Police*, *supra*.

the Supreme Court building and grounds -- serves a governmental function, but the grand scale and dimensions of the plaza also reflect its "public" status as an invitation to visitors from all over the nation and the world. Thus, at least in terms of physical and functional characteristics, the holding that the sidewalks surrounding the Court constitute a public forum, *Grace*, 461 U.S. at 183, should be extended to the plaza because, in physical form and function, the plaza is indistinguishable from the sidewalks, quadrangles or plazas in front of other "public" governmental locations, including the plaza of the Capitol Building.

It is well settled that the government must shoulder the burden of demonstrating that restrictions on speech in public places are justified. *Grace*, 461 U.S. at 177. Here, the holding on the "public forum" issue rests on a refusal to give any weight to the fundamentally "public" nature of the plaza area and its physical and functional attributes. This is a holding of substantial importance because designation as a nonpublic forum relieves the government of the burden of demonstrating that a restriction on speech is narrowly tailored to serve a significant government interest. As a result, restrictions on speech on the Supreme Court's grounds are now subject to less exacting scrutiny than restrictions applicable to most other public places in Washington, D.C. Thus, determination by this Court of the plaza's status as a public forum will not only resolve conclusively the question left open in *Grace* but provide uniform guidance on the right to peaceful expressive conduct in front of courthouses, legislative and executive office buildings and other public places in Washington, D.C. and around the nation.

2. The second issue presented arises from the court of appeals' predominant reliance throughout its opinion on the government's interest in protecting this Court from the *appearance* of susceptibility to outside influence. This government interest was relied upon (1) in support of the conclusion that the plaza was not a public forum and (2) as the "significant interest" which would justify the restriction on "processions" or "assemblages" on the plaza if the plaza were deemed to be a public forum. App., *infra*, 11a-13a. Despite repeated argument from petitioners throughout these proceedings,[8] the court of appeals failed to consider whether such a government interest was content-based, a question which this Court in *United States* v. *Eichman*, 110 S.Ct. 2404, 2408 (1990), held to be appropriate whenever a government interest is related to the suppression of free expression -- regardless of the "forum" status of the setting in question. See also *Texas* v. *Johnson*, 491 U.S. 397, 407 (1989).[9]

Eichman and *Johnson* both held that the government's interest in protecting the flag as a symbol of national unity is necessarily content-based because the state's interest in protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." *Eichman*, 110 S.Ct. at 2407; *Johnson*, 491 U.S. at 410. The same is true of the government's interest in

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[8] Appellant's Brief 12, n.7; Appellants' Reply Brief 10; Petition for Rehearing 2-5.

[9] Petitioners do not dispute the lower courts' observation that Section 13k is *facially* content-neutral. *Grace*, 461 U.S. at 181, n.10. However, *Eichman* made clear that when a restriction is based upon content-based government *interest*, it is irrelevant whether the restriction itself contains content-based limitations. *Eichman*, 110 S.Ct. at 2408.

protecting the symbolic interest in judicial independence. A gathering on the plaza that communicates no message -- a group of tourists waiting in line to enter the Supreme Court building, for example -- cannot possibly undermine or affect the appearance of judicial independence.

The government's articulated interest is implicated *only* to the extent that a "procession" or "assemblage" on the plaza communicates to third persons some message about the Court or its decisions, such as criticism or praise for a particular Court decision or a demand that the Court take a particular action in a pending case. Thus, like the flag-burning statute struck down in *Eichman*, the interest in avoiding the appearance of judicial susceptibility to outside influence "suppresses expression out of concern for its likely communicative impact." *Eichman*, 110 S.Ct. at 2409.[10]

Because the government's interest in preserving the symbolic independence of the judiciary is "directly related to expression in the context of activity," the failure of the court of appeals to apply the "most exacting scrutiny" plainly is inconsistent with the teaching of *Eichman*, 110 S.Ct. at 2409, and *Johnson*, 491 U.S. at 410, 412.[11] The

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[10] As with the government interest asserted in *Eichman*, 110 S.Ct. at 2409, petitioners do not dispute that the government has a legitimate interest in preserving the actual integrity of the judicial process as well as in protecting the judiciary from the appearance of improper influence. Rather, the fundamental flaw in the court of appeals' analysis is its failure to recognize or address the possibility that the government's asserted interest in keeping the judicial process free from the appearance of outside influence is a content-based interest requiring strict scrutiny and the least-restrictive-alternative test.

[11] *Boos* v. *Barry*, 485 U.S. 312, 321 (1988), makes clear that the "most exacting scrutiny" standard called for by the decision in *Johnson*,

absence of any scrutiny into the "content-based" nature of the articulated government interest also contrasts sharply with the standard of First Amendment review in recent decisions in the federal courts of appeals. For example, the Fourth Circuit in *Baugh* v. *Judicial Inquiry and Review Comm'n*, 907 F.2d 440 (4th Cir. 1990), conducted a careful analysis of the nature of the restriction prohibiting disclosure of communications to the Judicial Inquiry and Review Commission. Because the government's asserted justification for the restriction was "very closely related to the content of the speech" and could "only be justified by the content of the speech," the court concluded that the government interest involved was content-based and therefore subject to the strictest scrutiny. *Baugh*, 907 F.2d at 444.[12]

It is clear that the court below did not apply a standard of strict scrutiny to the restriction on "processions" and "assemblages" on the plaza of the Court; indeed, the court

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491 U.S. at 412, is identical to the "least-restrictive-alternative" standard, which has been applied by the Court in a variety of contexts. This standard was applied in *Boos* in striking down a content-based restriction on speech in front of foreign embassies. *Boos*, 485 U.S. at 321.

[12] The Second Circuit Court of Appeals, in determining the level of scrutiny to be applied to a transit authority regulation prohibiting begging and panhandling in the subway system similarly inquired whether the governmental interest at stake was related to the suppression of free expression. *Young* v. *New York City Transit Authority*, 903 F.2d 146, 158-59 (2nd Cir.), *cert. denied*, 111 S.Ct. 516 (1990). The court asked "whether the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct." *Id.* The court ultimately concluded that the subway restriction was content-neutral because it was not aimed at the message being disseminated but rather at the dangers created by the conduct involved (begging and panhandling).

conceded that the provisions in question were "far broader in [their] reach" than necessary to promote any of the interests in question.[13] Given the importance of the First Amendment's prohibition of content-based restrictions on speech in the face of an inadequate government interest, *Eichman*, 110 S.Ct. at 2408-10, and the inconsistency between the decision below and the holdings of this Court and other federal courts on this central First Amendment doctrine, the decision below warrants this Court's review.

3. The third issue presented involves the court of appeals' use of a narrowing construction that limits the application of Section 13k to demonstrations which "compromise the dignity and decorum of the Court" and which threaten "the appearance of the Court as a body not swayed by external influence." App., *infra*, 20a, 22a. The court's limiting construction is plainly inconsistent with this Court's holding in *Aptheker*, 378 U.S. at 516, that a court should not adopt a narrowing construction which substitutes vagueness for overbreadth.[14]

At issue in *Aptheker* was a statute that made it a felony for a member of a Communist organization to apply for, use or attempt to use a passport. This Court rejected a narrowing construction of that statute that would have applied the statute only to "the top-ranking Party leaders involved here." *Aptheker*, 378 U.S. at 515. According to

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[13] *Supra* note 2 and accompanying text.

[14] Instead, in such circumstances, the court's obligation is to strike down the overbroad statute, leaving it to the legislature to redraft. Thus, a saving construction is appropriate "only if it is possible to define a precise category of conduct privileged by the first amendment which can be clearly stated to fall outside the reach of the restructured statute. Otherwise, the overbroad statute remains vague." L. Tribe, *American Constitutional Law*, 1031, n.9 (2d ed. 1988).

the Court, such an "attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application . . . ." *Id.* at 516.

Similarly, in *Baird* v. *Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972), the First Circuit rejected a narrowing construction of a statute making it unlawful to deliver any drug or article for prevention of conception. The government urged interpreting the ban as applying only to such "articles not reasonably believed dangerous to health . . . ." The court reasoned that the statute, "prior to its amendment, advanced no constitutionally permissible objective, and the amendment revealed no purpose except to preserve as much of the statute as possible in the face of supervening judicial authority . . . ." Thus, the "narrowing" of such a vague statute would serve no proper purpose and "would be mere pretense." *Baird*, 429 F.2d at 1402.[15]

In this case, the court of appeals' narrowing interpretation represents an effort -- rejected in *Aptheker* and *Baird* -- to preserve a statute which embodies no constitutionally permissible government interest in suppressing speech. The decision below instructs law enforcement authorities to interrupt, and possibly arrest, only those demonstrators who lack "order and decorum" or whose message threatens to suggest that the Court is susceptible to influence. Given the subjectivity inherent in determining what will "compromise . . . decorum" or give

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[15] *See also Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), where a district court followed the *Aptheker* rule in refusing to narrow an overbroad statute prohibiting wire or cable distribution of any "pornographic" or "indecent" material to subscribers.

rise to an appearance of susceptibility to influence, it was impermissible to leave those determinations to law enforcement officials without further guidance. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis"); *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971) (statute violates Due Process when it is so vague that "men of common intelligence must necessarily guess at its meaning" (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926))).

As "narrowed," the statute at issue in this case provides no basis to distinguish persons (such as petitioners) who might wish to engage in orderly expression *to the public* of their opinions on issues before the Court from persons seeking to exert influence (or to give the impression of exerting influence) on the Court itself. The narrowing construction also fails to establish any objective guidelines by which to determine whether the speech in question has fallen short of the necessary standard of decorum.[16] Given the importance of First Amendment limitations on the *criminalization* of speech and the patent inconsistency of the decision below with established overbreadth principles, the holding of the court below on this issue is worthy of review by this Court.

* * * * *

[16] The question is *not* whether the words are capable of dictionary definition, as all words are, but whether uniform and objective standards will be capable of application. *See Smith* v. *Goguen*, 415 U.S. 566, 581 (1974) ("treating the flag 'contemptuously'" is unconstitutionally vague and fails to provide any stable, objective guidance as to what is permitted, because flag etiquette changes from generation to generation).

In sum, review of the decision below is warranted because the court's holding threatens to subject petitioners to criminal punishment based largely on the court's concern with the symbolic content of their expression. Because the analysis of the court below is inconsistent with the decisions of this Court and other federal courts, that decision should not be permitted to become the model to which other courts will look in evaluating restrictions on speech near courthouses. Instead, a definitive statement from this Court regarding the disposition of the important federal questions presented is essential to proper resolution of these issues. Finally, if for no other reason, this Court should review the decision below because it involves the definitive interpretation of a statute restricting speech on this Court's grounds. The determination of the scope of the rights to free expression on the grounds of this Court simply is too important to be left to a lower court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 88-957, 88-1021, 88-1023, 88-1024, 88-1026,
88-1027, 88-1029, 88-1030, 88-1031

ROBERT PEARSON, *et al.*,
Appellants,

v.

UNITED STATES,
Appellee.

Argued June 6, 1990
Decided October 4, 1990

Appeals from the Superior Court of the
District of Columbia

(Hon. Arthur L. Burnett, Trial Judge)

Gene C. Schaerr, with whom Richard Swick was on the brief, for appellants.

John D. Bates, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, and W. Mark Nebeker and R. Craig Lawrence, Assistant United States Attorneys, were on brief, for appellee.

Before ROGERS, Chief Judge, and NEWMAN and TERRY, Associate Judges.

ROGERS, Chief Judge:

Appellants appeal their conviction of parading and assemblage on Supreme Court grounds, 40 U.S.C. § 13k (1988), and unlawful entry, 40 U.S.C. § 13e (1988) and Regulation Two, promulgated pursuant to 40 U.S.C. § 13*l* (1988), on the ground that the statute and the regulation are narrowly tailored to support the government's interest and violated their First Amendment rights by impermissibly prohibiting expression in a public forum, the Supreme Court plaza. Alternatively, they contend that, notwithstanding the trial judge's narrowing constructions, the statute and regulation are unconstitutionally overbroad and vague. We affirm.

I

The essential facts are undisputed. In January 1988, appellants were among approximately fifty thousand people who participated in an annual anti-abortion march from the Ellipse in Washington, D.C. to the Supreme Court of the United States to protest the Court's decision in *Roe v. Wade*.[1] In anticipation of the march, the Marshal of the Supreme Court, acting pursuant to Regulation Two, closed certain areas of the Supreme Court grounds, including the

[1] 410 U.S. 113 (1973).

plaza and the main steps, between 1 p.m. and 6 p.m. on January 22, 1988, to all persons except the press.[2] Notice of the closure was posted at least twenty-four hours in advance of the march and barricades were placed at the top of the stairs leading to the Supreme Court plaza. Despite the plaza's closure, appellants approached the barricades in groups of two to seven people. They were advised by

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[2] Regulation Two, promulgated on October 8, 1987, pursuant to 40 U.S.C. § 13n (1988) provides:

> In order to protect the Supreme Court building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum, the Marshal of the Supreme Court, pursuant to his responsibilities outlined in 40 U.S.C. 13*l*, may, at any time, declare the Supreme Court building and grounds, or any portion thereof, closed to the general public. Any person who, having been informed of the closure of the building or grounds, or portions of the building or grounds, enters the closed areas without authorization of the Marshal or refuses to leave the closed areas after being requested to do so, shall be subject to arrest and subject to penalties set forth in 40 U.S.C. § 13m.

40 U.S.C. § 13m provides:

> Whoever violates any provision of section 13g to 13k of this title, or of any regulation prescribed under §13*l* of this title, shall be fined not more than $100 or imprisoned not more than sixty days, or both, prosecution for such offenses to be had in the Superior Court of the District of Columbia, upon information by the United States Attorney or any of his assistants: *Provided*, That in any case where, in the commission of any offense, public property is damaged in an amount exceeding $100, the period of imprisonment for the offense may not be more than five years.

Section 13*l* (a) provides that "[i]n addition to the restrictions and requirements specified in sections 13g to 13k of this title, the Marshal of the Supreme Court may prescribe such regulations . . . as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds."

officers at the Court that if they entered the plaza area, they would be subject to arrest.[3] Appellants still entered the plaza and knelt down in prayer.[4] They were informed twice that they were violating the law and were requested to disperse. When appellants refused to leave, they were arrested for parading and Assemblage on Supreme Court grounds and unlawful entry.[5] At the time of their arrests there were about thirty people, including appellants, on the plaza.

The trial judge denied appellants' motion to dismiss the charges. He rejected appellants' contention that the Supreme Court plaza is a public forum either by tradition or designation, and concluded that the relatively recent practice, according to appellants, of media interviews of counsel and news conferences held on the plaza did not create a tradition. Noting the unique function of the Supreme Court, the judge observed that by enactment of section 13k and Regulation Two the government has, in effect, designated the plaza as a nonpublic forum. Each, the judge ruled, was a content neutral and reasonable

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[3] Appellant Williams did not agree that warnings were given as he passed the barricade, but did admit he heard subsequent warnings. Appellant Pearson's recollection was similar to that of appellant Williams.

[4] Appellant Williams also carried a sign which read "The Gift of Life, God's Special Gift."

[5] 40 U.S.C. § 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization or movement.

The unlawful entry charge was based on 40 U.S.C. § 13*l* and Regulation Two. See *supra* note 2.

method of serving government interests. Alternatively, citing *United States v. Wall*, 521 A.2d 1140, 1144 (D.C. 1987), the judge ruled that section 13k, as well as Regulation Two, which was not before the court in *Wall*, were narrowly drawn and served a significant government interest even under the more stringent public forum standard. Finally, the judge rejected appellants' claim that the statute and regulation were unconstitutionally overbroad because each was susceptible to a constitutionally sound limiting construction. The judge construed the statute as limited to providing for protection of the Supreme Court building and grounds, and persons and property therein, and the maintenance of proper order and decorum, and Regulation Two as limited by its expressly stated purpose. Declining to rule on the vagueness claim, since appellants' conduct fell within the narrowed scope of the statute and regulation, the judge nonetheless concluded that the statute and regulation, in light of their purposes, were clear and definite.

II

In *Wall*, this court, upon applying the different standards for reviewing statutes which regulate First Amendment speech depending on the character of the property at issue, rejected the same challenge to section 13k by anti-abortion demonstrators that is raised in the instant appeal. 521 A.2d at 1143-44 (citing *Perry Education Ass'n v. Perry Local Educator's Ass'n (Perry)*, 460 U.S. 37, 44 (1983)). In *Wall*, as here, a small group of anti-abortion demonstrators went to the plaza area of the Supreme Court grounds and ascended the steps leading to the entrance to the Court building. When they did not retreat to the sidewalk area after being warned they would otherwise be arrested, but

continued to kneel and pray, they were arrested. The trial court held that the plaza area was a public forum and application of section 13k to Wall's activity was unconstitutional. *Id.* at 1142. This court reversed, holding that the first clause of the statute[6] passed muster under both the standard applicable to nonpublic forums and the test applied to time, place and manner restrictions permissible in public forums.[7] *Id.* Accordingly, the only question in the instant appeal is whether, as appellants contend, the standard used by this court in *Wall* has been "vitiated by several subsequent Supreme Court decisions," all of which, they claim, firmly hold that a statute is not narrowly tailored merely because it is "'not unrelated' to the means it is intended to serve." *See M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971) (a division of the court is bound by opinion of another division absent *en banc* review). Relying on *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2758 (1989), *Frisby v. Schultz*, 108 S.Ct. 2495, 2503 (1988), and *Boos v. Barry*, 485 U.S. 312 (1988), appellants maintain that section 13k and Regulation Two are "'far broader' than necessary to achieve any legitimate

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[6] The first clause of section 13*l* refers to the "parade, stand or move in processions or assemblages in the Supreme Court Building or grounds." The second clause refers to "display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *See United States v. Grace*, 461 U.S. 171, 175 (1983) (clauses are severable); *Wall*, *supra*, 521 A.2d at 1142 n.3.

[7] The court did not decide whether the plaza and main entrance steps of the Supreme Court grounds are a public forum for First Amendment purposes. *Wall*, *supra*, 521 A.2d at 142. The concurring opinion concluded that the areas comprise a nonpublic forum. *Id.* at 1145 (Ferren, J., concurring) (areas are "'public property which is not by tradition or designation a form for public communication'") (quoting *Perry*, *supra*, 460 U.S. at 46).

governmental objectives" and consequently fail to meet the narrowly tailored standard.[8] To address this contention we first review the proper analytical framework.

A.

The Supreme Court has classified properties into three categories for purposes of First Amendment speech analysis: the traditional public forum, the government-designated public forum, and the non-public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc. (Cornelius)*, 473 U.S. 788, 802 (1985); *Perry*, *supra*, 460 U.S. at 45. Where a property has a long tradition of devotion to assembly and debate, the rights of the government to restrict expressive activity are very limited.[9] *Perry*, *supra*, 460 U.S. at 45. In a public forum, where the restriction on speech is content based, the government must show that its regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). However, even in a public forum, the government

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[8] Appellants' main argument, however, is that the trial court misread *Grace*, *supra*, 461 U.S. at 183. Appellants contend that because the Supreme Court in *Grace* held that section 13k's prohibitions did not sufficiently serve the government's purpose of restricting displays in order to sustain its validity when applied to displays on the public sidewalks on the perimeter of the Supreme Court grounds, "there is no basis for holding that Section 13k or Regulation Two is any more narrowly tailored to that objective when applied to a protestor on the plaza in front of the building." For reasons we discuss *infra*, this argument is meritless.

[9] The most common examples of this "quintessential public forum" are parks and streets which have traditionally been used for the purposes of assembly and the communication of thoughts between citizens. *Perry*, *supra*, 460 U.S. at 45.

may enforce reasonable content neutral time, place and manner regulations that are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 45.

The second category is public property which has been designated as a place for expressive activity by government action.[10] *Id.* As in a traditional public forum, content based restrictions must be narrowly drawn to effect a compelling state interest. *Id.* at 46 (citing *Widmar v. Vincent*, *supra* note 6, 454 U.S. at 269-70.) Content neutral restrictions must be reasonable time, place and manner restrictions. *Id.* at 46.

Lastly, nonpublic forums are properties which are not forums for public communication or expression by tradition or designation. *Id.* Access to publicly owned property is not guaranteed by the First Amendment, *id*, (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)), and like any private property owner, the government has the right "to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* In addition to reserving the non-public forum "for its intended purposes, communicative or otherwise," the government may also enforce time, place

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[10] Although these "designated public forums" were not originally designed as forums for speech, as long as the government retains "the open character of the facility," they are subject to the same standards as a traditional public forum. *Perry*, *supra*, 460 U.S. at 45-46. *E.g. Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities provided for use by student groups). *See also City of Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 429 U.S. 546 (1975) (municipal theater). The government "is not required to indefinitely retain the open character of the facility." *Perry*, *supra*, 460 U.S. at 46.

and manner restrictions as long as the regulation on speech is reasonable and not an effort to suppress the speaker's point of view. *Id.*

Appellants contend that the Supreme Court plaza is a traditional public forum which has been devoted to assembly and debate. They maintain the plaza, as an unenclosed, accessible area immediately adjacent to an important government building, is physically and functionally similar to the public sidewalks surrounding that area, and the spacious public lawns and open areas surrounding the Capitol.[11] Consequently, appellants contend that the government mistakenly advances factors in support of the constitutionality of the statute and regulation which are relevant only to a determination of a designated public forum, and not to the Supreme Court, a traditional public forum.

Although we agree with appellants that the physical and functional attributes of a building may be relevant to a determination that a public property is a public forum, these attributes are properly significant only to the extent that they reflect the use and purpose of the property.[12] *See*

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[11] Appellants cite *Jeannette Rankin Brigade v. Chief of the Capitol Police (Jeannette Rankin Brigade)*, 342 F. Supp. 575 (D.D.C.) (three judge panel), *aff'd mem.*, 409 U.S. 972 (1972).

[12] Indeed, cases cited by appellants support this proposition. Appellants contend the Supreme Court's summary affirmance of a case which held that the Capitol Grounds is a public forum necessarily leads to the conclusion that the Supreme Court is also a public forum. *See Jeannette Rankin Brigade*, *supra* note 11, 342 F. Supp. 575 (holding speech restriction on Capitol Grounds pursuant to 40 U.S.C. § 193(g) unconstitutional). In reaching this conclusion, appellants note that section 13k was modeled after 40 U.S.C. § 193(g), and therefore urge that section 13k also unconstitutionally restricts speech. Contrary to appellant's characterization, however, in *Jeannette Rankin Brigade* the

Grace, *supra*, 461 U.S. at 178-80. As the government argues in its brief, the forum test should focus on whether the place has been devoted to assembly and debate, not whether the physical features of the Supreme Court are similar to other public forums, and appellants' assertion that the plaza has traditionally been used for public expression by the media, attorneys and others is unsupported in the record and in the law. Further, as the trial judge pointed out, "[e]ven the appearance that the U.S. Supreme Court bases its decisions on something other than the court record and oral argument . . . tends to undermine public confidence in the integrity of the U.S. Supreme Court as an institution."

Traditional public forums have "immemorially been held in trust for the use of public and time out of mind, have been used for purposes of assemblage, communicating thoughts between citizens and discussing public questions. *Perry*, *supra*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Although the Supreme Court has

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court looked to the purpose of the property and held that the Capitol Grounds is a public forum because it has traditionally been open to the public; the primary purpose of the Capitol -- legislating -- is compatible with speech accessibility; and the expansive definition of Capitol Grounds unnecessarily included demonstrations not "'near' or 'in the immediate vicinity of' the Capitol itself." *Id.* at 584.

Similarly, appellants rely on a decision by the Fourth Circuit Court of Appeals that was recently reversed by the Supreme Court. In *United States v. Kokinda*, 110 S.Ct. 3115 (1990), a plurality of the Court expressly contradicted the theory appellants posit. The Court held that a walkway leading from a United States Post Office to its parking lot was not a public forum in spite of its substantially similar appearance to a municipal sidewalk. *Id.* at 3120-21. The purpose of the walkway, the plurality held, was postal business and it was not dedicated to public expression as is the municipal sidewalk. *Id.* at 3121. The fifth justice, concurring, provides no solace to appellants. See *infra* note 15.

traditionally been open to the public, that characteristic alone is insufficient to make it a public forum. *See Greer v. Spock*, 424 U.S. 828, 836 (1976) (military base). In spite of a tradition of public access, appellants' contention that the Supreme Court building and grounds comprise a public forum is hardly consistent with the public forum test that such places "ha[ve] . . . been traditionally held open for the use of the public for expressive activities." *Grace*, *supra*, 461 U.S. at 178. Nor is their contention, the effect of which would be to permit demonstrations on the Court's grounds, consistent with the Court's primary purpose and constitutional tradition as interpreted by the Court. *See id.* at 178, 182-83.

Judicial decisions addressing the issue of government interest in speech restrictions in and around courthouse grounds have universally recognized the tradition of constitutional and legislative safeguards which guard the integrity of the judicial process and free it from outside influence as well as the appearance of such influence.[13] *Cox v. Louisiana*, 379 U.S. 559, 562, 565 (1965). The government has a legitimate interest to guard against the appearance of impropriety: "Judges are human; and the legislature has the right to recognize the danger that some judges, . . . and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms." *Id.* at 565. *See also Grace*, *supra*, 461 U.S. at 182-83; *Jeannette Rankin Brigade*, *supra* note 11, 342 F. Supp. at 584. Even if, as appellants assert, the Court "regularly" permits the press and media to use the

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[13] Contrary to appellants' assertions, the Supreme Court did not reject, but acknowledged, the distinction between the judiciary and the legislature in *Grace*, *supra*, 461 U.S. at 182-83. What the Court rejected was the distinction between the public sidewalks surrounding the Court and any other municipal sidewalk. *Id.* at 179-80.

plaza and steps for reporting purposes, this practice does not compromise the non-public status of the Court and its grounds. At most, if such action created a "limited" public forum, the constitutional right of access would extend only to other activities of similar character. *Perry*, *supra*, 460 U.S. at 48. Clearly appellants' demonstration activity is not of similar character to that of the media, attorneys, and others who use the Court's grounds for the limited purpose of disseminating information about and from the Court to the public.

Moreover, appellants' contention that restricting them to the sidewalks surrounding the Supreme Court grounds denies the effectiveness of their symbolic assertion that the Court's decisions sometimes blur the distinction between the legislature and the judiciary, is a hypothesis appellants seek to advance, not a statement of law. Appellants' belief that the most effective way to criticize the Court is to treat it like a legislature does not eliminate the tradition and importance of preserving the integrity of the judiciary.

Accordingly, the court in *Wall* held that section 13k's prohibition on processions and assemblages in the plaza area and main entrance steps of the Supreme Court met "the test imposed on the exclusion of speakers from non-public forums" as a reasonable and viewpoint neutral regulation of speech.[14] 521 A.2d at 1144. The court assessed the reasonableness of section 13k in light of the purpose of the forum and all the surrounding circumstances, *see Cornelius*, *supra*, 473 U.S. at 809, and concluded that the statute's restrictions were reasonably related to the Court's purpose. Noting the limited utility in some circumstances of focusing on whether the tangible

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[14] It is undisputed that the challenged statute and regulation are content neutral. *See Perry*, *supra*, 460 U.S. at 46.

property is a public forum when a restriction can be upheld as a reasonable time, place or manner restriction, the *Wall* court also applied the more stringent test for a public forum and concluded that the prohibition was constitutional since it was narrowly tailored and served the significant interest of the government in preserving the integrity of the judiciary. 521 A.2d at 1144; *Grace v. Burger*, 214 U.S. App. D.C. 375, 384, 665 F.2d 1193, 1202 (1981) (historically insulated from the political sphere, the purpose of the Court is to entertain arguments "properly . . . presented in official pleadings, briefs and memoranda, not on placards.") The two primary purposes of the statute -- "to permit unimpeded access and egress of litigants and visitors to the Court, and to preserve the appearance of the Court as a body not swayed by external influence" -- were "'significant' governmental interests that can support a time, place or manner restriction" in a public forum. 521 A.2d at 1144. The court was satisfied, in view of the availability of the municipal sidewalks surrounding the Court, that Wall's right to express his views was not significantly diminished by lack of access to the steps and the plaza of the Court. *Id.* at 1145. These same conclusions would appear to apply to appellants here.

B.

Appellants contend, however, that recent decisions by the Supreme Court make clear the error of *Wall*. An examination of the decisions on which appellants rely -- *Ward v. Rock Against Racism*, *supra*, 109 S.Ct. at 2758, *Frisby v. Schultz*, *supra*, 108 S.Ct. at 2503, and *Boos v. Barry*, *supra*, 485 U.S. 312 -- makes patently clear the lack of merit to appellants' contention. These cases continue to rely on the same standards previously an-

nounced by the Supreme Court, and to the extent that they reflect any differences, the differences arise from the particular facts in issue and not from a change in law. Indeed, in *Kokinda*, *supra* note 12, 110 S.Ct. 3115, the Court's most recent First Amendment opinion, the Court has again made clear that *Perry* is the applicable analytical framework, 110 S.Ct. at 3119, 3121, and that the key test in *Grace* continues to be the basis for determining whether a place is a public forum. *Id.* at 3121.

Further, appellants' contention that the term "narrowly-tailored" has been redefined by the Court to require a "least-restrictive analysis" test is explicitly disavowed by the Court in the very cases appellants cite. *Ward v. Rock Against Racism*, *supra*, 109 S.Ct. at 2757-58 & n.6. In a nonpublic forum the Court continues to require only that the government's content neutral decision to restrict access be reasonable; "it need not be the most reasonable or the only reasonable limitation." *Kokinda*, *supra*, 110 S.Ct. at 3122. The *Kokinda* plurality also rejected the notion that because some kinds of speech are allowed it is impermissible to suppress other speech.[15] *Id.* The challenged postal regulation in *Kokinda* prohibited only in-person solicitation for the immediate payment of money, any form of which a majority of the Court viewed as disruptive of the business at hand. *Id.* at 3123, 3124. Thus, a majority of the

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[15] Mr. Justice Kennedy, concurring, observed that "there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum." *Kokinda*, *supra* note 12, 110 S.Ct. at 3125. Further he acknowledged that "[w]hile it is proper to weigh the need to maintain the dignity and purpose of a public building, . . . other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended." *Id.* (citing *Grace*, *supra*, 461 U.S. at 182).

Court was satisfied that the regulation was narrowly tailored.

In *Ward v. Rock Against Racism*, *supra*, 109 S.Ct. 2746, the Court upheld a municipal noise regulation for music played in New York City's Central Park band shell requiring performers to use sound system and sound technicians provided by the city. The Court concluded that the regulation was narrowly tailored to serve a significant governmental interest in protecting its citizens against unwelcome noise. Directly rejecting appellants' contention in the instant appeal, the Court stated that the "less-restrictive alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner exception." 109 S.Ct. at 2757 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984)).

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so.

Id. at 2757-58 (footnote omitted). Furthermore, the Court pointed out that reliance on *Boos v. Barry*, 485 U.S. 312 (1988), for a contrary view "ignores a crucial difference between that case and this one" since the regulation invalidated in *Boos* was a content-based ban on display and, therefore, subject to "the most exacting scrutiny."[16] *Id.* at 2758 at n.6.

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[16] The regulation at issue in *Boos v. Barry* prohibited any sign within 500 feet of a foreign embassy if the sign tends to bring that foreign government into "public odium" or "public disrepute," and also prohibited congregations (elsewhere defined as groups of more than 3

Likewise *Frisby* also reflects application of settled, *pre-Wall* standards. *Frisby* involved a city ordinance prohibiting picketing "before or about" any residence, which the Court concluded was "readily subject to a narrowing construction that avoids constitutional difficulties." 108 S.Ct. at 2510 (picketing occurring in front of a particular residence). Addressing the problem created by a complete ban, the Court stated that it may be narrowly tailored on if "each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 2502-03. The Court was persuaded that the ordinance was so narrowed by the circumstances that the picketers banned by the ordinance "generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way," that even a solitary picket can invade residential privacy, and the captive audience cannot avoid the objectionable speech. *Id.* at 2503.

Even if appellants were to view the factual settings of these cases as offering some evidence that the Court is retreating from the use of the public forum doctrine to justify limitations on, rather than expansion of, First Amendment freedoms, *see Wall*, *supra*, 521 A.2d at 1143 n.5 citing commentary,[17] they offer no basis on which this division can hold that the statute is unconstitutional. In *Wall* the court specifically held that section 13k's prohibition was narrowly drawn to serve two primary interests. 521 A.2d at 1145. Appellants' reference to the statement in *Wall* that the provisions are not "unrelated to the ends

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persons) within 500 feet of any such building or premises. 108 S.Ct. at 1161.

[17] *See also Kokinda*, *supra*, 110 S.Ct. at 3127 n.1 (Brennan, J., dissenting) (commentary criticizing the Court's fora analysis).

that it was designed to serve." *Id.* at 1145, as indicating that the court's analysis is no longer viable, omits reference to the court's subsequent statements that the statute does not prohibit all access to the Court grounds by persons not having business there, but only parading, standing or moving in processions or assemblages, and leaves open "ample alternative channels of communications." *Id.* Accordingly, we find no basis on which to conclude that our decision in *Wall* has been vitiated by subsequent Supreme Court decisions, and hence no occasion to alter our analysis that appellants' statutory challenge based on a public forum must fail.

III

We turn to appellants' overbreadth claim. They contend the trial judge's narrowing construction of section 13k is invalid because that statute is not "readily susceptible" to this interpretation. Specifically they assert that the language of section 13k does not suggest any of the limitations articulated by the trial judge. In contending that the statute is overbroad because its terms apply not only to protestors but to any group of attorneys or tourists or Court employees, appellants view the statute as strikingly similar in breadth to the municipal airport resolution held to be unconstitutionally overbroad in *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc. (Airport Comm'rs)*, 107 S.Ct. 2568 (1987).

The First Amendment overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge a statute on its face "because it also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have

the law declared partially invalid." *Airport (Comm'rs, supra*, 482 U.S. at 574 (*quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 503 (1985)). In order to be invalidated for overbreadth, a statute or regulation must proscribe a "substantial amount" of constitutionally protected activity. *Id.* at 574; *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Due to the severity of the only remedy for overbreadth, namely, complete invalidation of the regulation or statute, courts have a "duty to avoid constitutional difficulties" by applying an appropriate narrowing construction where possible. *Boos v. Barry*, *supra*, 108 S.Ct. at 1169 (citing *New York v. Ferber*, *supra*, 458 U.S. at 769 n.24; *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971)). *See Broadrick v. Oklahoma*, *supra*, 413 U.S. at 613. Thus, in *Boos v. Barry*, the Court upheld the site-specific construction of the congregation clause of the regulation -- permitting dispersal only of congregations directed at an embassy -- as preventing the statute from reaching a substantial amount of constitutionally protected conduct. 108 S.Ct. at 1168.

Section 13k. In a more limited context the Supreme Court examined section 13k for overbreadth in *Grace*, *supra*, 461 U.S. at 179. In that case individuals were prohibited from standing on the sidewalk in front of the Supreme Court building while distributing leaflets and pamphlets to passersby. 461 U.S. at 173. The Court held that the inclusion of the perimeter sidewalks in the definition of the Court's geographic boundaries, set for section 13k in 40 U.S.C. § 13p, rendered the statute overly broad. *Id.* at 179. The sidewalks surrounding the Court grounds, wrote Justice White, "are indistinguishable from any other sidewalks in Washington, D.C." *Id.* Evaluated as a content-neutral speech restriction in the public sidewalks

surrounding the Court grounds, the Court concluded section 13k was an unreasonable time, place, and manner restriction on First Amendment speech activity.

Section 13k is separable into two distinct parts.[18] On its face, the congregation clause, which prohibits parading, standing, and moving in processions and assemblages, prohibits any group activity on the Court's grounds. Thus, as appellants assert, the language prohibits groups of tourists, attorneys or Court employees from standing or moving in "assemblages." Such an absolute ban on any group activity is not supported by the government's legitimate and important interests in protecting the integrity of the Court, preventing the appearance of judicial bias,[19] and safeguarding the Court grounds and personnel.[20] The

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[18] The trial judge noted in his opinion that it had been represented that the charges against appellants do not involve, and the evidence will not show, the existence of any banners, signs or placards being used. The judge expressly found that appellants' activities did not fall within the display prohibition of section 13k, and appellants have not contended to the contrary on appeal. Therefore, we address only the parade and assemblage provisions of the first clause. See *supra notes* 5 & 6.

[19] *See Cornelius*, *supra*, 473 U.S. at 809; *Cox*, *supra*, 379 U.S. at 565.

[20] Although the impetus for congressional enactment of section 13k, which is part of an eleven section statute addressing the policing of the building and grounds of the Supreme Court, was "termination of the practice by District of Columbia [government] authorities of appointing Supreme Court guards as special policemen for the District [of Columbia]," *Grace*, *supra*, 461 U.S. at 181, the brief legislative history accompanying the statute does not ignore the unique character of the Court. *See* H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949) ("in keeping with the dignity of the highest Court in the land, provision should be made for policing of its building and grounds . . . ."); S. Rep. No. 719, 81st Cong., 1st Sess. 2 (1949) (Marshal is

clause is, however, as the trial judge ruled and this court held in *Wall*, *supra*, susceptible to a narrowing construction, confining the scope of the clause to protection of "the [Supreme Court] building and grounds and of persons and property within, as well as the maintenance of proper order and decorum," *Grace*, *supra*, 461 U.S. at 182, and "to preserve the appearance of the Court as a body not swayed by external influence." *Wall*, *supra*, 521 A.2d at 1144; *Grace*, *supra*, 461 U.S. at 183.

Appellants misconstrue the Supreme Court's reluctance to narrow the municipal airport ban on First Amendment activity in *Airport Comm'rs*. The language of the section 13k's congregation clause does not create a First Amendment free zone as purportedly established by the airport ban in *Airport Comm'rs*, *supra*, 107 S.Ct. at 2570.[21] In that case the Court could find no saving construction of "such a sweeping ban," whereby "virtually every individual who enters the [airport] may be found to violate the resolution by engaging in some 'First Amendment activity[y],'" since the words of the resolution "simply leave no room for a narrowing construction." 107 S.Ct. at 2572. Indeed, the Court concluded that it would be "difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication

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authorized to maintain "order and decorum . . . [i]n keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it. . . .").

[21] The municipal airport ban expressly stated that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." 107 S.Ct. at 2570.

intolerable." *Id.* It rejected a "murky," open-ended interpretation, confining the ban to non-airport related activity, as offering little protection against "virtually unrestrained [police] power to arrest and charge persons with a violation of the resolution." *Id.* at 2573.

Although the prohibition in section 13k against congregating on Court grounds is absolute, it is not open in the same manner to the "indefinite number" of interpretations as was the airport resolution, based on the inconvenience of First Amendment activities to airport purposes, struck down by the Court. *Id.* at 2572 (citing, as an example, *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) (loyalty oath statute held not susceptible to narrowing construction because numerous potential interpretations of the core language would necessitate extensive future adjudications)). Unlike the elusive government interest underlying the airport ban in *Airport Comm'rs*, *supra*, the government concern underlying section 13k is readily identifiable and aimed at two types of activity inimical to the Court's functions: demonstrations on Supreme Court grounds and use of those grounds as a forum for voicing private views. The Supreme Court has acknowledged as legitimate and important the government's concern for sheltering and insulating the judiciary from the appearance of political influence. *Cox*, *supra*, 379 U.S. at 565. *See Grace*, *supra*, 461 U.S. at 182-83; *Greer v. Spock*, *supra*, 424 U.S. at 839 (need to protect non-political government entities from even the appearance of acting as a handmaiden for partisan political causes). This court could do no less. *Wall*, *supra*, 521 A.2d at 1144-45. *See also Jeannette Rankin Brigade*,

Further, there is no requirement that a limiting construction must be derived from the express language of the statute, merely that the statute itself be susceptible to the

narrowing construction. The limiting construction adopted by the trial judge, relying on the Supreme Court's interpretation of the statute's legislative history in *Grace*, *supra*, 461 U.S. at 182, is akin to those upheld (albeit under a stricter standard) in *Boos v. Barry*, *supra*, 108 S.Ct. at 1168 (narrowing construction which permitted dispersals only of congregations that were directed at an embassy alleviated the statute's overbreadth impediment) and in *Frisby*, *supra*, 108 S.Ct. at 2501 (ban narrowed to picketing in front of a particular residence). Therefore, when limited to group demonstrations directed at the Court which compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel, section 13k can withstand an overbreadth challenge because the statute only prohibits group activity which is contrary to the government's legitimate interests. Those interests-protection of the Court building and grounds, and persons and property within, and maintenance of proper order and decorum -- are broader than those served by 18 U.S.C. § 1507 (which makes it illegal to demonstrate on public property near a courthouse with the intent to influence court, judges, employees, witnesses), and thus other provisions of law do not serve as an adequate alternative. Such a limiting construction obviously would not prevent attorneys from walking up the steps to the Court or occasional pedestrian use, including reportorial activities, since these activities are substantially different from demonstrations aimed at influencing the Court's decisions.

Regulation Two. Regulation Two, a trespass law, codifies the Marshal's inherent power to close portions of the Court buildings and grounds to the public.[22] The

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[22] *See* 40 U.S.C. § 13c, 131, & 13n.

Marshal, to function, must be given reasonable discretion and regulation Two is not unconstitutionally overbroad since it is limited by its stated purpose and the law.

On its face, Regulation Two provides broad authorization to the Marshal to close the Court grounds, thereby prohibiting all activities, protected and unprotected. However, Regulation Two provides that the purpose underlying its promulgation is to permit the Marshal "to protect the Supreme Court building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum." Consequently, the trial judge could properly conclude that Regulation Two did not vest the Marshal with unconstitutionally broad authority to close the Court grounds when limited to situations which threaten the safety of the grounds or employees or the order and decorum required for the dignity of the Court.

In *Ward v. Rock Against Racism*, *supra*, the Court rejected the claim of invalidity of the congregation clause of a regulation on the ground that "unbridled discretion" was placed in the city officials charged with enforcement, noting that there was no claim that the discretion was unfettered and that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." 109 S.Ct. at 2755 (citations omitted). Likewise, in *Boos v. Barry*, *supra*, discretion similar to that vested in the Marshal was vested in the police in connection with congregations around embassies; the Court upheld the congregation clause of the statute, and the police discretion to enforce it, by limiting the authority of the police to order dispersal only when the police reasonably believed that a threat to the security of the embassy was present. 108 S.Ct. at 1167. Similarly, the trial judge's narrowing of the Marshal's authority to close the Supreme

Court grounds only when the Marshal reasonably believes that the safety of the Court grounds or employees or the order and decorum required for the dignity of the Court are threatened, saves the regulation from proscribing a "substantial amount" of protected activity. So narrowed, we hold that Regulation Two is not unconstitutionally overbroad.[23]

Finally, appellants argue that, even as narrowed by the trial judge, section 13k and Regulation Two are unconstitutionally vague. In particular, they assert that the words "order," "decorum," and "dignity" are "inherently ambiguous" so that people of common intelligence could not determine with any degree of confidence whether a particular demonstration would compromise the integrity of the Court.

The "particular context" of the statute and regulation give fair notice of the restrictions on political displays and group activity. *E.g.*, *Boos v. Barry*, *supra*, 108 S.Ct. at 1169 (construction that police may order dispersal upon reasonable belief that embassy "security or peace" is threatened gives notice in the context of embassy security, namely, whether normal embassy activities have been or are about to be disrupted); *Grayned v. Rockford*, 408 U.S. 104, 107-08 (1972) (ordinance prohibiting individuals near schools from "disturb[ing] the peace" of school gave "fair notice" of its scope, namely whether normal school activity

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[23] Even if, as the government suggests in its brief, future challenges to Regulation Two by declaratory or injunctive relief or as a defense to a prosecution lead to further refinement of the scope of the Marshal's authority, such refinements would not invalidate the Marshal's underlying authority or the regulation's purpose. *See Finzer v. Barry*, 255 U.S. App. D.C. 19, 39, 798 F.2d 1450, 1470 (1986), *rev'd on other grounds sub nom.*, *Boos v. Barry*, *supra*, 108 S.Ct. 1157.

has been or is about to be disrupted). The language here may, in some respects, not be as clear cut as that involved when the issue concerns whether normal activity was about to be or had been disrupted. On the other hand, the language is no less clear than that in *Boos v. Barry*, 108 S.Ct. at 1169, and *Grayned v. Rockford*, 408 U.S. at 112, where the word "peace" was unsuccessfully attacked as impermissibly vague. The attack failed because the existence of potentially clearer guidelines does not render terms vague. In the context of activities on the Supreme Court grounds, the words "order," "decorum," and "dignity" are readily defined and enjoy their common literal and political definitions, which we have no reason to believe are not commonly and generally understood, particularly where the highest court of the land and the third branch of our government is involved.

In sum, we hold that section 13k, when limited to protection of the Supreme Court building and grounds, and persons and property within, and maintenance of proper order and decorum, and that Regulation Two, with similar limits on the Marshal's power, withstand appellants' constitutional challenges based on the assertions that the Supreme Court plaza is a public forum and that the statute and regulation are overbroad and vague. Accordingly, the judgment is affirmed.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

United States of America	)	
v.	)	
Tara Connelly Bridgett	)	Criminal Case Nos. M1252-88
Dennis Burdick	)	M1244-88
Richard Burno	)	M1247-88
Rex Carpenter	)	M0785-88
Kevin Connelly	)	M0776-88
Mary Connelly	)	M1246-88
Michael Connelly	)	M1245-88
Henry Corvin	)	M0795-88
Donna Cullinen	)	M0798-88
Thomas Furtado	)	M0780-88
Thomas Herlihy	)	M0800-88
Dennis Jamison	)	M0777-88
Mary Jones	)	M0801-88
George Todd Krail	)	M0794-88
Joseph Salvatore Lopes	)	M1248-88
Ronald Markun	)	M0787-88

Charles Matsop	)	M0802-88
Margaret McGee	)	M0799-88
Gerald McWilliams	)	M0793-88
Michael Meyer	)	M1255-88
Robert Emmett Moran	)	M0784-88
Robert Pearson	)	M0782-88
Charles Radich	)	M0802-88
Joseph Radich	)	M0803-88
Ron Schweger	)	M0799-88
Anthony Silva	)	M0783-88
Joseph Veltri	)	M0778-88
Norman Joseph Williams	)	M1251-88
Joseph David Wright	)	M0797-88
————————	)	

MEMORANDUM AND OPINION

I. FACTS

The essential facts are not in dispute. The Marshal of the Supreme Court received information that a Right to Life group was planning a march of approximately 50,000 people through Washington, D.C., ending on First Street, N.E., between the U.S. Supreme Court and the U.S. Capitol on January 22, 1988. On January 20, in response to this information, the Marshal issued an order closing the Supreme Court grounds from 1:00 p.m. - 6:00 p.m. to

everyone except the press.[1] The Marshal's power to issue such an order emanates from 40 U.S.C., Section 131 and Regulation Two, promulgated thereunder in October, 1987.

On January 22, 1988, the Right to Life group conducted their planned march. They allegedly crossed a police line and entered the Supreme Court plaza, and were thereafter arrested. The defendants were charged with violating 40 U.S.C., Section 13k (parading and assemblages on Supreme Court grounds) and Regulation Two.[2]

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[1] A side entrance was left open for conducting Supreme Court business.

[2] In its entirety, Section 13k of Title 40, U.S. Code states:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner or device designed or adapted to bring into public notice any party, organization, or movement.

The activities of the defendants here did not include "display[ing] . . . any flag, banner or device . . .", so the Court's inquiry is limited solely to the first part of the statute. See, *United States v. Grace*, 461 U.S. 171, 175, 103 S.Ct. 1702, 1706, 75 L.Ed. 2d 736 (1983) on the severability of the two provisions. See also, *United States v. Wall*, 521 A.2d 1140, 1142 n.3 (D.C. 1987).

Regulation Two states:

> In order to protect the Supreme Court building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum, the Marshal of the Supreme Court, pursuant to his responsibilities outlined in 40 U.S.C., Section 131, may, at any time, declare the Supreme Court Building and grounds, or any portion thereof, closed to the general public. Any person who, having been informed of the closure of the building or grounds or portion of the building or grounds, enters the closed area without the authorization of the Marshal or refuses to leave the closed area after being requested to do so shall be subject to arrest and subject to penalties set forth in 40 U.S.C., Section 13m.

II. ISSUE BEFORE THE COURT

These cases are before the court on the defendants' motion to dismiss the charges filed against them. On April 13, 1988 twenty-nine of the defendants filed a Motion to Dismiss and a Memorandum in Support thereof ("Defendants' Motion to Dismiss"). On April 19, 1988, the government filed its opposition to the defendants' motion ("Opposition"), and on May 13, the government's supplemental opposition to the defendants' motion to dismiss ("Government's Supp. Opp.") was filed. The defendants then filed a supplemental memorandum and reply to the opposition (Defendant's Memorandum and Reply") on May 17, 1988 and their Reply to the Government's Supplemental Opposition on May 19, 1988. Finally, on June 2, 1988 the defendants filed a reply to the government's Supplemental Opposition ("Defendants reply"). On May 20, 1988, the court heard extensive oral arguments by counsel.

The defendants contend that (1) section 13k of Title 4(of the United States Code ("section 13k") unconstitu tionally prohibits expression in a public forum; (2) sectio 13k is unconstitutionally overbroad and vague; (3) Regula tion Two, promulgated by the Marshal pursuant to authori ty under 40 U.S.C., Section 131, unconstitutionall regulates expression in a public forum and; (4) Regulatio Two is overbroad in that it confers unbridled discretion o the Marshal to regulate expressive activity.

III. ANALYSIS

A. Section 13k and Regulation Two are not Unconstitutional Limitations on Expressive Activities.

1. *The Supreme Court Plaza is Not a Public Forum.*

No court has previously explicitly determined, so far as our research disclosed, whether the plaza in front of the U.S. Supreme Court is a public forum. However, in *Grace*, *supra*, the defendants were charged with violating the "display" clause of section 13k based on their activities on the sidewalks abutting the Supreme Court grounds. The Supreme Court held that sidewalks, generally, constitute a traditional public forum and that the sidewalks surrounding the Supreme Court are not unique in this regard. *Grace*, *supra*, at 179, 103 S.Ct. 1708[3] While limiting its holding to sidewalks, the *Grace* court noted that

> [i]t is argued that the Supreme Court building and grounds fit neatly within the description of nonpublic forum property. Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activity.

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[3] The defendants argue that under *Grace* it is the physical characteristics of the public property alleged to be a public forum that are dispositive, and not the nature of the government function carried out on that property. Defendants' Supplemental Memorandum and Reply at p.4. This Court cannot agree with this interpretation of the prior judicial precedent. Indeed, the nature of the government function is a critical factor in determining the property's public forum status. See, *e.g.*, *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed. 2d 505 (1976) (sidewalks in a military installation are not a public forum). See also *Wall*, *supra*, at 1144.

Grace, *supra*, at 178, 103 S.Ct. at 1707, 75 L.Ed. 2d 736.[4] Later on, the Court stated:

> [t]raditional public forum property [i.e. sidewalks] occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts *government property that has been dedicated to a use other than as a forum for public expression.*

Id., at 180, 103 S.Ct. at 1708, 75 L.Ed. 2d 736 (emphasis added). The emphasized language is clearly a reference to the plaza and the rest of the Supreme Court grounds which the sidewalks abut.[5]

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[4] Furthermore, as the Court noted in *Grace*, *supra*, at 177, 103 S.Ct. at 1707, publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will.

[5] Justice Marshall, concurring in part and dissenting in part in *Grace*, *supra*, at 184, 103 S.Ct. at 1711, 75 L.Ed. 2d 736, urged a broad ruling that the Supreme Court grounds, as well as the sidewalks, constituted a public forum. He asserted, "[v]isitors to this Court do not lose their First Amendment rights at the edge of the sidewalks any more than 'students or teachers shed their constitutional rights to freedom or speech of expression at the schoolhouse gate.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Since the continuing existence of the statute will inevitably have a chilling effect on freedom of expression, there is no virtue in deciding its constitutionality on a piecemeal basis." *Grace*, *supra*, at 184. Citing cases to the effect that every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question, whether that place is a school, a library, the grounds of a statehouse, or the grounds of the United States Capitol, he pointedly observed, "I see no reason why the premises of this Court should be exempted from this basic principle. It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional

An independent analysis of the factors to be considered leads this Court to the same conclusion it has inferred from the majority opinion in *Grace*, i.e., that the Supreme Court plaza is not a public forum. In *Perry Education Ass'n v. Perry Local Education's Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed. 2d 794 (1983) the Supreme Court recognized three categories of property relevant to a First Amendment analysis: a traditional public forum such as public parks, streets, or other property "which by long tradition or government fiat have been devoted to assembly and debate"; a nontraditional public forum which has become a public forum by government designation, i.e., "public property which the State has opened up for use by the public as a place for expressive activity"; and, a nonpublic forum -- "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Education Ass'n*, *supra*, at 44, 103 S.Ct. at 954, 74 L.Ed. 2d 794. See also, *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, _____ U.S. _____, _____, 107 S.Ct. 2528, 2571, 96 L.Ed. 2d 500 (1987), *Grace*, *supra*, at 177, 103 S.Ct. at 1707, 75 L.Ed. 736, *Wall*, *supra*, at 1143.

Property that is a public forum by tradition or designation bears a veil of immunity from government regulation of expression. This veil may only be pierced in limited circumstances and only if the regulation meets certain stringent criteria. The regulation must be a reasonable time, place and manner restriction, it must be

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rights. I would apply to the premises of this Court the same principle that this Court has applied to other public places." *Grace*, *supra*, at 185. However, the *Grace* majority was not persuaded by Justice Marshall's views so poignantly set forth. This Court is no more persuaded by the defendants' arguments here, than the majority in *Grace* was by the views advanced by Justice Marshall in his opinion.

content-neutral, it must be narrowly tailored to serve a significant government interest and it must leave open ample alternative channels of expression. *Frisby v. Schultz*, 43 Cr L 3161, 3163 (U.S. June 27, 1988), *Grace*, *supra*, at 177, 103 S.Ct. at 1707, 75 L.Ed. 2d 736, quoting *Perry Education Ass'n*, *supra*, at 45, 103 S.Ct. at 955, 74 L.Ed. 2d 794. See also, *Board of Airport Comm'rs*, *supra*, at _____, 107 S.Ct. at 2571, 107 L.Ed. 2d 500 and *Wall*, *supra*, at 1144.

If the regulation is non-content neutral, it will pass constitutional muster only if it is the least restrictive means available to meet a compelling government interest. *Boos v. Barry*, _____ U.S. _____, _____, 108 S.Ct. 1157, 1164, 99 L.Ed. 2d 333 (1988), *Board of Airport Comm'rs*, *supra*, at _____, 107 S.Ct. at 2571, 107 L.Ed. 2d 500, quoting *Perry Education Ass'n*, *supra*, at 45, 103 S.Ct. at 955, 75 L.Ed. 2d 736.

The government may regulate expression on nonpublic forum property "so long as the regulation is both reasonable and not an effort to suppress the speaker's point of view." *Wall*, *supra*, at 1143. The state may also regulate the property to the degree necessary to "reserve the forum for its intended purposes, communicative or otherwise." *Perry Education Ass'n*, *supra*, at 50-51, 103 S.Ct. at 958, 74 L.Ed. 2d 794. See also *Greer v. Spock*, *supra*.

The defendants contend that the plaza is a traditional public forum by virtue of its use by the media for interviews, and because of its physical similarity to other plots of public property which have been defined as public forums. Defendants' Memorandum Reply at p.3 and Defendants' Reply at p.3. The defendants' first point is not

persuasive. News reporters frequently interview counsel for litigants on the courthouse steps and news conferences in that area are not a rarity. However, this relatively recent practice recounted by the defendants through largely anecdotal representation does not create a "tradition."

This limited use by the media to inform the public is not inconsistent with the nonpublic forum status of the U.S. Supreme Court plaza and grounds. Reporters are informants, furnishing information from and about the Court and its decisions to the public. Lobbying activity, such as the type permitted near a statehouse or other legislative bodies, seeks to inform those within the building of the opinions and feelings of the public and such activity is considered most appropriate when directed to the attention of a representative body. The U.S. Supreme Court, however does not decide its cases on the basis of public sentiment or opinion, but rather relies on briefs filed by interested parties and on oral arguments presented directly in the Court on the record. As the majority in *Grace* cogently observed: "Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging the cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups." *Grace*, *supra*, at 183. Even the appearance that the U.S. Supreme Court bases its decisions on something other than the court record and oral argument, it has persuasively been argued, tends to undermine public confidence in the integrity of the U.S. Supreme Court as an institution. The legislative and executive branches, on the other hand, are majoritarian, democratic institutions and are specifically designed, and are fully expected under our constitutional framework, to respond to the will of the people. Thus, lobbying and

picketing activities aimed at these two branches are an integral part of the democratic system, and are constitutionally protected, whereas the same activities may be regulated when conducted outside of a courthouse. For these reasons, this Court also rejects the defendants' second argument. As noted above, the use of the property is one of the most essential factors to be considered in making a determination as to the public forum status of that public property. Since the function of Supreme Court is unique, its surrounding property must be treated accordingly. See *Wall*, supra at 1145 n.7 ("[R]egulation of expression outside a courthouse may be permissible where the same regulation applied to the grounds surrounding a legislature would not be.")

This Court also concludes that the U.S. Supreme Court plaza is not a public forum by designation either. The government's permission of interviews and news conferences conducted on the plaza does not make the plaza a public forum. Such approbation does not amount to an affirmative approval of expressive and protest activities on the U.S. Supreme Court grounds. In fact, by enacting laws such as section 13k and Regulation Two, the government has, in effect, designated the plaza as a nonpublic forum.[6] The plaza falls most clearly within *Perry Education Associations* final category - a nonpublic forum.

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[6] The *Grace* Court noted that "the government [may not] transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, *supra*, at 180, 103 S.Ct. at 1708, 75 L.Ed. 2d 730. This court does not imply otherwise. The laws in question here are merely evidence of the government's intent not to designate a public forum and have no bearing on whether the plaza is a traditional public forum.

2. *Section 13k does not Unconstitutionally Prohibit Expression in a Public Forum.*

A decision that the plaza is a nonpublic forum is actually not necessary with regard to an analysis of section 13k as applied to the facts of these cases.[7] In *Wall*, *supra*, the District of Columbia Court of Appeals, while declining to decide whether the plaza is a public forum, upheld section 13k against a constitutional challenge even under the stricter scrutiny required for public forums. In *Wall* the defendant was demonstrating in the plaza area and on the steps leading to the Supreme Court building. He was charged with violating the first clause of section 13k. After a trial to the bench the court there found that the defendant had knowingly violated section 13k but held that he was not guilty on the grounds that the plaza area and entryway to the Supreme Court constitute a public forum and the application of this section to his conduct unconstitutionally infringed on his First Amendment rights. *Wall*, *supra*, at 1142. The Court of Appeals reversed, holding that

> 40 U.S.C. Section 13k's prohibition on processions and assemblages in the plaza area and main entrance steps of the Supreme Court is reasonable and viewpoint-neutral, and, therefore, meets the test imposed on exclusion of speakers from nonpublic forums. We also believe that the prohibition meets the more stringent test applicable to a time, place and manner restriction that may be imposed even in a public forum: that it be narrowly drawn to serve a

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[7] However, as a subordinate ruling and relying on *Grace*, *supra*, and the majority's rejection of Mr. Justice Marshall's views, this Court concludes that the Supreme Court grounds and plaza constitute a nonpublic forum. This is thus an alternative grounds for denying the defendants' motion to dismiss.

> significant governmental interest, that it be content-neutral, and that it leave open ample alternative channels of communication.

Wall, *supra*, at 1144. This Court is bound by the rule of law as stated by the District of Columbia Court of Appeals.

The defendants contend that *Wall* is not controlling here, first because it bears only on the "demonstrating" and not the "picketing" provision of section 13k. Defendants' Memorandum and Reply at p.7. It is not clear which provision the defendants' claim pertains to "picketing" but the defendants are apparently referring to the "display" clause which this Court has already concluded is inapplicable. It has been represented in prior hearings that the charges here do not involve, not will the evidence at trial show the existence of any banners, signs, placards or posters being used by the defendants involved in these cases.

The defendants' second argument is that *Boos*, *supra*, sets forth a new standard of scrutiny, applicable here, which the *Wall* court did not apply, and thus *Boos* overrules *Wall* to the extent that it was based on the "old" standard. On the contrary, *Boos* is based on the standard enunciated in *Perry Education Association*, *supra*, for non-content neutral statutes, i.e. the government interest must be compelling and the statute must be the least restrictive means available to meet that interest. *Boos*, *supra*, at _____ and _____, 108 S.Ct. at 1164 and 1168, 99 L.Ed. 2d 333. The defendants acknowledge that section 13k is content neutral. Defendant's Reply at p.2, n.1. Therefore, the least restrictive means test does not apply, and the government's interest need only be substantial rather than compelling. The *Wall* court applied this long-standing

standard for content neutral statutes and held that section 13k is an appropriate time, place, and manner restriction which is narrowly tailored to meet a substantial government interest and which allows for alternative avenues of expression. *Wall*, *supra*, at 1144.[8] The defendants' argument to the contrary is based on one sentence in *Wall*: [n]one of [section 13k's] provisions appears unrelated to the ends that it was designed to serve." *Wall*, *supra*, at 1145.[9] This one sentence thus cannot override the actual holding in *Wall*, *supra*, and does not convince this Court that the District of Columbia Court of Appeals applied an erroneous standard.

3. *Regulation Two is Not an Unconstitutional Restraint on Expressive Conduct.*

Regulation Two was not before the District of Columbia Court of Appeals in *Wall*, *supra*, or before the U.S.

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[8] Here, the defendants had many alternative means of communication available to them, e.g. demonstration on the sidewalks, statements in the press and on television and radio, letters to members of Congress to promote a constitutional amendment, and many other avenues to make their views known.

[9] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed. 2d 221 (1984) is cited in *Wall* after the above quoted sentence. The defendants argue that the *Clark* court relied on an erroneous standard and by virtue of *Wall's* reliance on *Clark*, *Wall* is not good law. It is this Court's reading that *Clark* relies on the appropriate standard under *Perry Education Ass'n*, *supra*, and that Justice Marshall's dissent, which the defendants cite in support of their argument that the wrong test was applied, focuses on the application of that standard to the facts. Justice Marshall, in fact, states "I agree with the standard enunciated by the majority . . ." *Clark*, *supra*, at 308, 104 S.Ct. at 3076, 82 L.Ed. 2d 221 (Marshall, J. dissenting). In short, none of the authority on which the defendants rely support their argument that a new standard of review applies to First Amendment cases since *Boos*.

Supreme Court in *Grace*, and thus a determination of its constitutionality appears to be a matter of first impression. Regulation Two is content neutral on its face, and the defendants do not allege that it has been applied in a non-neutral, issue related, or discriminatory manner.[10] Based on the representations and arguments made in these cases this Court concludes that Regulation Two has not been used in an unconstitutionally manner "to suppress the speaker's point of view." *Wall*, *supra* at 1143. Regulation Two is reasonable. Its stated purpose is to protect the Supreme Court building and grounds, to protect the persons and property therein, and to maintain suitable order and decorum. Exhibit B to Defendants' Motion to Dismiss. This is the same as one of the purposes behind section 13k[11] which the *Wall* court found to be "substantial." While giving the Marshal closure power may not be the narrowest means of achieving the stated ends,[12] it certainly is a reasonable method and serves a substantial interest.

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[10] The government has brought to the court's attention only one other instance of the Marshal issuing a closure order under Regulation Two -- that occurred on October 13, 1987 in the face of a demonstration at the Supreme Court, regarding gay and lesbian rights. Government's Supp. Opp. at p. 10 n.3.

[11] The second purpose of Section 13k, to prevent the appearance that the Supreme Court will be influenced by lobbying is also applicable here. See discussion supra at pp. 9-10 and infra at pp.18-19.

[12] A narrower means would be to restrict expressive and protest activities which had as their object, and which required the participants to have the specific intent, to influence or intimidate a judge to make a particular decision. See, e.g. 18 U.S.C. Section 1507. A regulation specifically limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice would be consistent with the principles enunciated by the Supreme Court in *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 487 (1965). The regulation involved here is concededly far broader in its reach as is

Discretion vested in a law enforcement officer in applying or implementing a statutory provision does not, by itself, make that provision unconstitutional. A challenge to a statutory provision because it allowed for police discretion was raised in *Boos*, *supra*. There, the Supreme Court held that a statute was not unconstitutional simply because it left to the police the discretional decision of whether to order a congregation of people to disperse. The Supreme Court observed that the police power to disperse congregants was limited by the language and the purpose of the statute granting that power. If the police exercise their authority accordingly, they act reasonably. If they act outside of these strictures, they may be acting unconstitutionally. But the possibility of unreasonable conduct does not render the statutory provision itself unconstitutional.

Similarly here the Marshal's authority is circumscribed by the language and purposes of Regulation Two. This regulation represents even a more limited grant of power than in *Boos*, supra, because it gives only the Marshal of the Supreme Court -- not his deputies or other subordinates -- the authority to close the Court and its grounds. *Boos* permits any police officer to order dispersal under the statute there involved, District of Columbia Code, Section 22-1115. Authority vested in one individual is by definition, narrower and more reasonable than authority vested in each police officer of a large police force. If the Marshal acts outside of the purposes or language of Regulation Two, his closure order may be challenged in the courts as unreasonable. But a closure order issued consistent with these criteria is reasonable and the mere

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section 13k. When Justice Marshall made this point in *Grace*, *supra*, the majority was not persuaded. *Grace*, *supra*, at 170-171.

possibility that the Marshal may abuse his discretion in some hypothetical case is not a basis for determining that the regulation granting such discretion is unconstitutional.

B. Section 13k and Regulation Two are not Unconstitutionally Overbroad or Vague.

1. *Standards and Method of Analysis*

The Supreme Court has set forth a two step approach to analyzing a law for potential overbreadth and vagueness:

> [A] court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. [Footnote omitted] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed. 2d 362 (1982). The requirement that the overbreadth regulate a *substantial* amount of protected conduct" *Id.*, see also *Boos*, *supra*, at ___, 108 S.Ct. at 1168, 99 L.Ed. 2d 333, must be strictly adhered to because the only remedy, absent an available narrowing construction, is to strike down the entire law, a remedy which is considered "manifestly strong medicine." *Board of Airport Comm'rs*, *supra*, at ____, 107 S.Ct. at 2572, 96 L.Ed. 2d 500, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed. 2d 830 (1973). See also, *Finzer v. Barry*, 255 U.S. App. D.C. 19, 41,

798 F.2d 1450, 1473 (1986), reversed on other grounds, _____ U.S. _____, 108 S.Ct. 1157 (1988).

2. *Section 13k is not overbroad.*

The defendants contend that section 13k's "processions or assemblages" clause is "clearly overbroad because its terms apply not only to protestors, but also to any group of attorneys walking up the steps to attend oral argument, . . . to any group of tourists . . ., or to any group of Court employees." Defendants' Memorandum and Reply at p.11.[13] The defendants assert that section 13k "is strikingly similar in its breadth to the municipal airport ordinance held unconstitutionally overbroad in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 107 S.Ct. 2568 (1987)." Defendants' Memorandum and Reply at p.12.

The resolution in *Board of Airport Commr's*, supra, provided in pertinent part, "that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." *Board of Airport Comm'rs*, *supra*, at _____, 107 S.Ct. at 2570, 96 L.Ed. 2d 500. The Court struck down this resolution as overbroad because it could find "no conceivable government interest [which] would justify such an absolute prohibition of speech . . ." and because there was "no apparent saving construction of the resolution." *Id.* at _____, 107 S.Ct. at 2572, 96 L.Ed. 2d 500.

In *Boos*, *supra*, at _____, 108 S.Ct. at 1168, 99 L.Ed. 2d 333 the statute, which was also attacked as overbroad,

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[13] The defendants also put forth an argument regarding the "display" clause's overbreadth. Because this Court has already found that clause inapplicable to the cases at bar, its possible overbreadth will not be addressed here.

prohibited congregation within 500 feet of any embassy, legation or consulate. The Court found this blanket prohibition potentially problematic, but upheld it under the Court of Appeals' limiting construction of the statute as "permit[ting] the dispersal only of congregations that are directed at the embassy." *Id.* More specifically, the United States Court of Appeals had held that "the provision is limited by the general purposes which motivated the enactment as a whole, i.e. protection of the peace and security of the embassy. Dispersals may only be ordered [by the police] in accord with those purposes." *Finzer v. Barry*, *supra*, at 41 n.7, 798 F.2d at 1471 n.7.

Section 13k is equally susceptible to a comparable limiting construction consistent with its purposes to "provide for the protection of the [Supreme Court] building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum," *Grace*, *supra*, at 182, 103 S.Ct. at 1709, 75 L.Ed. 2d 736,[14] and "to preserve the appearance of the Court as a body not swayed by external influence." *Wall*, *supra*, at 1144. See also *Grace*, *supra*, at 183, 75 S.Ct. at 1710, 75 L.Ed 2d 736. Section 13k is thus to be limited by and to these stated purposes.

3. *Regulation Two is not Overbroad.*

The defendants assert that Regulation Two is also fatally overbroad in that it gives the Marshal unbridled authority to prohibit all First Amendment activity. Indeed, Regulation Two is closer to the absolute prohibition of the resolution in *Board of Airport Comm'rs*, *supra*, than is section 13k, in that the Marshal under Regulation Two is

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[14] See also *Wall*, *supra*, at 1144 n.6

broadly empowered to issue a closure order under Regulation Two, and thereby prohibit *all* activities, protected and unprotected. However, in *Board of Airport Comm'rs*, *supra*, at _____, 107 S.Ct. at 2572, 96 L.Ed. 2d 500, the Court found "no conceivable governmental interest that would justify such an absolute prohibition of speech."[15] In the cases at bar, the identifiable governmental interests (insuring safety and maintaining order and decorum) were found to be "substantial" by the District of Columbia Court of Appeals in *Wall* in connection with section 13k. Secondly, in *Board of Airport Comm'rs*, *supra*, the Court found "no apparent saving construction." *Finzer*, *supra*, as adopted by the Supreme Court in *Boos*, provides strong guidance in fashioning a narrow and constitutionally sound construction of Regulation Two. In *Finzer*, *supra*, the statute under scrutiny granted broad discretion to the police to disperse congregants when "necessary". *Finzer*, *supra*, at 40, 798 F.2d at 1471. The Court held that

> [t]he authority to disperse is given by a statute that has specific purposes. The authority may be exercised, therefore, only when the police reasonably believe that a threat to the security or peace of the embassy is present.

Finzer, *supra*, at 40, 798 F.2d at 1471, quoted in part in *Boos*, *supra*, at _____, 108 S.Ct. at 1168, 99 L.Ed 2d 333. Similarly here the authority of the Marshal to close the Supreme Court building and grounds, given by Regulation Two, is restricted by its purposes. The Marshal

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[15] It has also been suggested that there is a valid government interest in preventing even the appearance that the Supreme Court can be pressured in deciding its cases by parades, processions, assemblages, or protest demonstrations.

may close the Supreme Court building and grounds only when he reasonably believes that the safety of the grounds or of the employees, or that the order and decorum required for the dignity of the Supreme Court, are, in fact, threatened.

The Defendants' Vagueness Challenge Need Not be Reached.

Under the two step analysis set forth in *Village of Hoffman Estates*, *supra*, at 494-95, 102 S.Ct. at 1191, 71 L.Ed. 2d 362 "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." The defendants do not argue that their actions were not in violation of section 13k or of Regulation Two. Even under the narrow constructions adopted here, the defendants' conduct is clearly covered. Therefore their vagueness challenge need not be reached.

The defendants' vagueness challenge fails on its merits, as well. Section 13k and Regulation Two are limited by their respective purposes. So limited, the conduct which falls within their reach is clear and definite. Neither the statute nor the regulation is unconstitutionally vague.

For the foregoing reasons, the defendants' motion to dismiss is hereby DENIED.

/s/ Arthur L. Burnett, Sr.
ARTHUR L. BURNETT, SR.
JUDGE, Superior Court of the
District of Columbia

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APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-957
ROBERT PEARSON,

Appellant,

M782-88

No. 88-1021
DONNA CULLINEN,

Appellant,

M798-88

No. 88-1023
GEORGE T. KRAIL,

Appellant,

M794-88

No. 88-1024
JOSEPH S. LOPES,

Appellant,

M1248-88

No. 88-1026
ROBERT E. MORAN,

Appellant,

M784-88

No. 88-1027
ANTHONY SILVA,

Appellant,

M783-88

No. 88-1029
JOSEPH VELTRI,

Appellant,

M778-88

No. 88-1030
NORMAN J. WILLIAMS,

Appellant,

M1251-88

No. 88-1031
CHARLES RADICH,

Appellant,

M802-88

v.

UNITED STATES,

Appellee.

BEFORE: *Rogers, Chief Judge; Ferren, Belson, *Terry, Steadman, Schwelb, **Farrell and Wagner, Associate Judges; and *Newman, Associate Judge, Retired.

O R D E R

On consideration of appellants' petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

** Associate Judge Farrell has recused himself from these cases.

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Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

(2)

No. 90-1620

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PEARSON, ET. AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 40 U.S.C. 13k, as construed, is consistent with the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1620

ROBERT PEARSON, ET. AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 581 A.2d 347. The superior court opinion (Pet. App. 26a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1990. A petition for rehearing was denied on February 20, 1991. The petition for a writ of certiorari was filed on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

The nine petitioners were charged by information in the Superior Court for the District of Columbia with one count

of unlawful parading and assemblage on Supreme Court grounds, in violation of 40 U.S.C. 13k,[1] and one count of unlawful entry, in violation of 40 U.S.C. 13*l* and Regulation 2 thereunder.[2] Following bench trials upon stipulated facts for petitioners Pearson, Cullinen, Lopes, Moran, Silva, and Williams, and conditional guilty pleas by petitioners Radich, Krail, and Veltri, all petitioners except Radich were convicted on both counts.[3] The court imposed concurrent sentences of probation and separate fines of $10 on each count. Gov't C.A. Br. 3.

1. Petitioners participated in a January 1988 march to the Supreme Court of the United States protesting the Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). Pursuant to Regulation Two and in anticipation of the march, the Marshal of the Supreme Court ordered certain portions of the Court grounds, including the plaza and the main steps, closed to the general public between 1:00 and 6:00 p.m. that day. Notice of the closure was posted, barricades

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[1] That statute, in pertinent part, makes it unlawful to "parade, stand, or move in processions * * * in the Supreme Court Building or grounds." 40 U.S.C. 13k. See Pet. 2. A separate clause of the statute, not at issue here, prohibits certain displays of flags, banners, and devices. *Ibid.* See *United States* v. *Grace*, 461 U.S. 171, 175 (1983) (regarding severability of two clauses).

[2] Regulation Two, promulgated by the Marshal of the Supreme Court pursuant to 40 U.S.C. 13*l*, authorizes the Marshal to declare at any time that the Supreme Court building and grounds are closed to the general public and provides that persons refusing to leave after being requested to do so are subject to the penalties provided in 40 U.S.C. 13m. See Pet. App. 3a n.2. Petitioners do not renew in this Court their challenges to Regulation Two. See Pet. 6 n.3.

[3] Petitioner Radich pleaded guilty only to the count charging him with violating Regulation Two. His conditional guilty plea, like that of his co-defendants, preserved his right to appeal the denial of his motion to dismiss both counts. Gov't C.A. Br. 3.

were erected at the top of the steps leading to the plaza, and petitioners were advised that they would be subject to arrest if they entered the plaza. Petitioners nonetheless entered the plaza and knelt in prayer. Petitioners were arrested after they twice were asked to disperse and twice were informed they were violating the law. Pet. App. 2a-4a.

2. The Superior Court denied petitioners' motion to dismiss the information. Pet. App. 26a-46a. In rejecting petitioners' claim that the applicable statutes and regulation violate the First Amendment, the court held that the Supreme Court plaza is not a public forum. *Id.* at 30a-35a. Accordingly, the court explained, regulation of expression on the Supreme Court plaza is constitutionally permitted "so long as the regulation is both reasonable and not an effort to suppress the speaker's point of view." *Id.* at 33a (internal quotation marks omitted). The court held that the statutes and regulation met this test. *Id.* at 34a-36a & n.7. Alternatively, the court held that the statutes and regulation would be valid under the First Amendment even if the Supreme Court plaza were a public forum. *Id.* at 36a-41a.

Finally, the court rejected arguments that the statute and regulation were unconstitutionally vague or overbroad in prohibiting all processions or assemblages on the plaza. *Id.* at 41a-45a. The court ruled that Section 13k is susceptible to a "limiting construction consistent with its purposes to 'provide for the protection of the [Supreme Court] building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum' * * * and 'to preserve the appearance of the Court as a body not swayed by external influence.'" Pet. App. 43a (quoting *United States* v. *Grace*, 461 U.S. 171, 182 (1983)).

3. The court of appeals affirmed. Pet. App. 1a-25a. The court first concluded that the Supreme Court plaza is a nonpublic forum. *Id.* at 7a-13a. The court then observed that it had previously held in *United States* v. *Wall*, 521 A.2d 1140,

1144 (1987), that "section 13k's prohibition on processions and assemblages in the plaza area and main entrance steps of the Supreme Court met the test imposed on the exclusion of speakers from non-public forums as a reasonable and viewpoint-neutral regulation of speech." Pet. App. 12a (internal quotation marks omitted).

The court noted the "limited utility in some circumstances of focusing on whether the tangible property is a public forum when a restriction can be upheld as a reasonable time, place or manner restriction." Pet. App. 12a-13a. In *Wall*, the court observed, it had concluded that, regardless of the status of the plaza as a public or nonpublic forum, Section 13k was valid because it was "narrowly tailored and served the significant interest of the government in preserving the integrity of the judiciary." *Id.* at 13a. The court rejected petitioners' contention that intervening Supreme Court decisions had undermined the validity of *Wall*, Pet. App. 13a-17a, pointing out that the Court had recently held that, even in a public forum, a limitation on speech "need not be the least restrictive or least intrusive" means to accomplish a valid purpose. *Id.* at 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798-800 (1989)). Finally, the court rejected arguments that the statute and regulation were unconstitutionally overbroad and vague, Pet. App. 17a-25a, explaining that the "assemblages" clause was readily susceptible to a narrowing construction limiting its application to "group demonstrations directed at the Court which compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel." *Id.* at 22a. The narrowing construction was not unconstitutionally vague, since "the government concern underlying section 13k is readily identifiable" and the provision would apply only to activity that was plainly "inimical to the Court's functions." *Id.* at 21a; see also *id.* at 22a.

ARGUMENT

1. a. Petitioners argue that the statutory prohibition in 40 U.S.C. 13k on their assembly on the Supreme Court plaza to convey their views about judicial decisions is invalid under the First Amendment. Petitioners' claim is unavailing because the Supreme Court plaza is not a public forum for First Amendment activities.

An area that "by long tradition" has been "devoted to assembly and debate," *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), is classified as a public forum that is generally open to expressive activity by the public. Public streets, parks, sidewalks, and other nonspecialized public spaces are the paradigm examples of property that has "time out of mind" been held open for communicative activity. See *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939). As this Court has often stated, however, the First Amendment does not guarantee unlimited access to publicly owned property for expressive activities, and thus not all public property is a public forum. See *Perry*, 460 U.S. at 46 (1983); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981); accord *Greer* v. *Spock*, 424 U.S. 828 (1976) (military reservation not a public forum); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jail grounds not a public forum); *United States* v. *Kokinda*, 110 S. Ct. 3115, 3119 (1990) (walkway surrounding post office not a public forum) (plurality opinion).

The character of the public property, and the use to which it is dedicated, determine the government's ability to restrict expression in a particular location. Thus, even if government property is accessible to the public and bears some physical resemblance to streets, parks, or sidewalks, that property is not necessarily a public forum for First Amendment purposes. See *Kokinda*, 110 S. Ct. at 3120 (citing *Greer* v. *Spock*, 424 U.S. 828) ("The mere physical char-

acteristics of the property cannot dictate forum analysis."). Rather, the question is whether the property is set aside for a specialized use that is incompatible with the unrestricted availability of that property for expressive activity by the public.

On this analysis, the Supreme Court plaza, unlike the perimeter sidewalk surrounding the plaza (see *United States* v. *Grace*, 461 U.S. 171, 179),[4] is not a public forum. In contrast to the streets and sidewalks that immediately surround the Court grounds, the plaza, buildings, and grounds of the Supreme Court are, like the offstreet postal walkway in *Kokinda*, physically "remote from pedestrian thoroughfares." See *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576, 581 (2d Cir. 1991) (discussing *Kokinda* decision). The Supreme Court grounds are also functionally distinct from those areas. The area does not exist "to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 110 S. Ct. at 3120. "Persons using the [Court grounds] are not there primarily to meet a friend for lunch, windowshop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." *Lee*, 925 F.2d at 581.

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[4] In *Grace*, the Court held that the clause of 40 U.S.C. 13k that forbids some displays of a "flag, banner or device" on Supreme Court grounds is not valid as applied to the perimeter sidewalk of the Court. While the Court did not address whether the Supreme Court plaza is a nonpublic forum, it cited the teaching of *Greer* v. *Spock* that "property is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours." 461 U.S. at 178; see also *id.* at 177. Moreover, the Court took note of the contention that "[a]lthough the [Supreme Court] property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities." *Id.* at 178.

b. This Court recently reaffirmed the "long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s].'" *Kokinda*, 110 S. Ct. at 3119 (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)). In a nonpublic forum, a restriction on speech is valid if it is reasonable, viewpoint-neutral, and not motivated by a desire to suppress the speaker's viewpoint. *Perry Education Ass'n*, 460 U.S. at 46; see also *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985) ("The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."); *Kokinda*, 110 S. Ct. at 3119-3120.

The restriction in this case satisfies these requirements. As construed by the court of appeals, the "assemblages" clause of Section 13k is a reasonable means to advance a valid purpose: protecting the Supreme Court from the disruption of its work or the possible public perception that the Court is subject to influence by factors extrinsic to the judicial process. Demonstrations on the Supreme Court grounds carry the risk of interfering with the functioning of the Court, a concern that the government may legitimately consider in promulgating general regulations governing conduct in a nonpublic forum. See *Kokinda*, 110 S. Ct. at 3123-3124. In addition, just as the government has a legitimate interest in protecting against actual judicial impropriety, Congress may also "protect the judicial process from being misjudged in the minds of the public." *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (upholding the constitutionality of a state statute making it illegal to picket or demonstrate near a court). See also *Grace*, 461 U.S. at 183 (acknowledging the validity of the goal of preventing

the appearance "that the Supreme Court is subject to outside influence"); compare *Greer* v. *Spock*, 424 U.S. at 839 (ban on partisan political activities at military base was reasonable means of insulating military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates").[5]

It is equally clear, as petitioners concede (Pet. 15 n.9), that Section 13k is not, either as drafted or as applied here, "an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800. Petitioners do not claim that Section 13k discriminates among particular viewpoints or that they were arrested and prosecuted because the government disagrees with the view they were attempting to suppress.

c. There is no merit to petitioners' suggestion (Pet. 10, 12-13) that classifying the Supreme Court plaza as a nonpublic forum is in conflict with decisions of other courts.[6]

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[5] Petitioners claim (Pet. 12) that "[b]y considering the 'purpose' of this Court in determining whether the plaza constituted a public forum, the court [below] improperly injected consideration of the asserted interest in restricting speech—'preserving the integrity of' and public confidence in the judiciary—into its analysis of whether the plaza constituted a public forum." However, there is nothing improper about taking into account the specialized use for which the government has reserved its property in determining whether the property qualifies as a public forum. In numerous cases in which this Court has declined to classify public property as a public forum, it has relied on interests related to the particular function that the property serves. See *Adderley* v. *Florida*, *supra* (jailhouse grounds); *Greer* v. *Spock*, *supra* (military installation); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303 (1974) (public buses); *Kokinda*, 110 S. Ct. at 3120 (postal walkway "constructed solely to provide for the passage of individuals engaged in postal business").

[6] There is no inconsistency between classifying the Supreme Court plaza as a nonpublic forum and the holding in *Jeanette Rankin Brigade* v. *Chief of the Capitol Police*, 342 F. Supp. 575 (D.D.C.), aff'd mem., 409 U.S. 972 (1972), that the U.S. Capitol grounds are a public forum. The district court in *Jeanette Rankin* relied on its observation that

At issue in *Smith* v. *County of Albemarle*, 895 F.2d 953 (4th Cir.), cert. denied, 111 S. Ct. 74 (1990), was the status of "the front lawn of the County Office Building," not the grounds of a building used exclusively as a courthouse.[7] In addition, the court of appeals in *Smith* agreed with the district court's determination that the lawn was a "designated" public forum based on the expressive activities that had taken place there, including "a beauty pageant, a billboard for the United Way, two Easter 'sunrise' services, several assorted weddings, municipal band concerts, and a civil rights demonstration." *Id.* at 954, 955. Analogous activities have never been permitted on Supreme Court grounds.

2. a. The court of appeals in this case also correctly held that, even if the Court's grounds are a public forum, Section 13k is a valid time, place, or manner restriction. The fact that Section 13k forbids altogether a category of speech in a defined location does not render the statute invalid as applied to a public forum, as this Court acknowledged in *Frisby* v. *Schultz*, 487 U.S. 474 (1988). There, the Court

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"the primary purpose for which the Capitol was designed—legislating—[is not] incompatible with the existence of all parades, assemblages, or processions which may take place on the grounds." 342 F. Supp. at 584. The court also observed that, in contrast, courthouses are among the "areas which the state may shield from the clamor of public demonstrations." *Id.* at 583 (citing *Cox* v. *Louisiana*, 379 U.S. 559 (1965)).

[7] At one point, the court of appeals in *Smith* made a passing reference to the property as "the courthouse lawn" 895 F.2d at 959, but it is clear that the building served as a general office building for county government business, even if it was sometimes referred to as the "courthouse." The court of appeals described the property at issue as "the front lawn of the County Office Building," or "the lawn in front of [the] seat of government," 895 F.2d at 954-959, and there was no mention of a courthouse in the district court opinion. See *Smith* v. *Lindstrom*, 699 F. Supp. 549 (W.D Va. 1988).

held that a ban on demonstrations on a residential street as applied to picketing directed at a particular residence was a valid means of preserving residential privacy. The Court stated that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 485; see also *ibid.* ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.").

The proscription on demonstrations on Court grounds is no more extensive than necessary to advance valid government interests. See Pet. 16 n.10. The ban operates in a defined location (the Supreme Court building and grounds), and there are ample alternative opportunities for similar First Amendment activities nearby (that is, on the municipal sidewalk surrounding the Court). See *United States* v. *Grace*, *supra*). See also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding blanket ban on expressive "sleeping" in Washington D.C. parks, finding that "the regulation narrowly focuses on the Government's substantial interest in maintaining the parks"); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (upholding complete ban on posting of signs on public property); *Kokinda*, 110 S. Ct. at 3125-3126 (Kennedy, J., concurring) (complete ban on in-person solicitation on postal walkway is valid time, place, or manner regulation).

b. Petitioners suggest (Pet. 15-18) that Section 13k must be subject to the "most exacting scrutiny" because the government has sought to eliminate demonstrations from Supreme Court grounds "out of concern for their likely communicative impact." Pet. 16 (quoting *United States* v. *Eichman*, 110 S. Ct. 2404, 2409 (1990)). That characterization is misleading, because the government is not concerned with whether the public will be swayed by the primary message the demonstrators seek to convey, but, instead, with

the "secondary effects" of demonstrations on Court grounds—that is, the creation of the appearance that the Court is influenced by public pressures in deciding cases. See, *e.g.*, *Barnes* v. *Glen Theatre, Inc.*, No. 90-26 (June 21, 1991) (Souter, J., concurring), slip op. 3-6. Section 13k is directed at a wholly "neutral" purpose of protecting the Court. Thus, the government's interest is unrelated to the desire to promote or suppress communication on particular topics or ideas, and Section 13k applies in an evenhanded manner regardless of the underlying subject matter or viewpoint of the demonstration.[8]

3. There is no merit to petitioners' claim (Pet. 18-20) that Section 13k, as construed by the court of appeals, is impermissibly vague. Unlike in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), and *Baird* v. *Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972) (see Pet. 18-19), the construction adopted by the court limiting the "assemblages" clause is based on valid statututory objectives, see *Grace*, 461 U.S. at 182, and is reasonably clear with regard to conduct it reaches. The statute as construed by the court of appeals is not so amorphous as to "grant standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22 (1972).

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[8] Contrary to petitioners' suggestion, this case is not analogous to *United States* v. *Eichman*, *supra*, and *Texas* v. *Johnson*, 491 U.S. 397, 407 (1989). In those cases, the government sought to foster a reverential view of the flag by suppressing its use to express contrary views. Here, in contrast, the government has restricted activities only in a certain location and only to the extent that they have the potential to cause injury to property or persons, or to disrupt the decorum and order of the Court, or to create the impression that the Court is subject to influence by public demonstrations. The government has not sought to suppress negative views of the Court or the Court's decisions; the restrictions apply without regard to the content of the expression or the viewpoint expressed.

Rather, the determination whether persons are engaged in a demonstration that threatens persons, property, or judicial decorum is a sufficiently objective matter that the public and the officers charged with the statute's enforcement can determine with reasonable confidence what conduct is forbidden. See *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *Kolender* v. *Lawson*, 461 U.S. 352, 357-362 (1983). See also *Boos* v. *Barry*, 485 U.S. 312 (1988) (upholding construction of statute prohibiting persons from congregating within 500 feet of a foreign embassy as applying only to "congregations that are directed at an embassy" and that present a "threat to the security or peace of the embassy").

Petitioners do not, and could not, claim to be uncertain as to whether their conduct is proscribed. Not only did the statute as written provide petitioners with "fair warning" that their conduct was forbidden, but they were told that the Supreme Court plaza was closed to their activities during the time in question.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20632

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

(3)

No. 90-1620

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ROBERT PEARSON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF OF PETITIONERS

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July 17, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONERS

The United States argues that the conviction of petitioners for unlawful "assemblage" on the plaza of the United States Supreme Court building, 40 U.S.C. § 13k, should not be reviewed because no substantial First Amendment question is presented. To the contrary, the question presented follows naturally from this Court's decision in *United States* v. *Grace*, 461 U.S. 171 (1983), which invalidated the application of the same statute to peaceful protest conducted on the sidewalks surrounding the Court. The case also squarely presents the significant and recurring issue of what type of public property constitutes a public forum. Finally, the case unquestionably involves peaceful expressive conduct at the core of what the First Amendment protects and thus raises an important symbolic issue of the application of First Amendment principles in the area surrounding the building in which this Court sits to interpret those principles.

The government ignores the practical and symbolic importance of the issue presented and merely argues that

the holding below is correct. That limited response, which essentially disregards the reasons for granting the petition, warrants a brief reply.

1. The United States asserts that the Supreme Court plaza, unlike the perimeter sidewalk that surrounds the Court, is "functionally distinct" from areas such as public sidewalks, parks and other nonspecialized public places that traditionally are deemed public forums. Opp. 5-6. Although the Supreme Court building and grounds properly may be set aside for "specialized use," the plaza—the only area of the Court's grounds at issue here—is *in fact* used as a public area in which many persons "meet a friend for lunch, . . . take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." Opp. 6 (quoting *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576, 581 (2d Cir. 1991)). The plaza has built-in benches where persons often sit and relax while watching the fountains or the Capitol Building when the weather is pleasant. Moreover, at any given time, numerous people walk through the plaza either to go to the Court or to get from one part of Capitol Hill to another. Thus, for many people the plaza serves as an urban park or walkway area completely divorced from business at the Court.

Alternatively, the United States argues that even if the plaza is a public area, it is not a "public forum." This is so, the government suggests, because the "property is set aside for a specialized use that is incompatible with the unrestricted availability of that property for expressive activity by the public." Opp. 6. However, given the long tradition of the plaza's use for expressive activities—particularly by attorneys who often use the plaza for speeches and impromptu press conferences (Pet. App. 11a-12a, 33a-34a)—the suggestion that the plaza is not a traditional forum for expression of opinion regarding the Court and its work is without merit.

2. The United States further argues that, even if the plaza is a public forum, the court below correctly concluded that the flat prohibition in "Section 13k is a valid time, place, or manner restriction" (Opp. 9) because it was "narrowly tailored and served the significant interest of the government in preserving the integrity of the judiciary." Pet. App. 13a. In particular, the courts below (and now the United States) rely on the argument that the restriction is narrowly tailored to the " 'significant' governmental interest[]" in "preserv[ing] the appearance of the Court as a body not swayed by external influence." *Id.*; see Pet. App. 20a (Section 13k "susceptible to a narrowing construction, confining the scope of the clause to protection of the [Supreme Court] building and grounds and of persons and property within . . . , and to [preservation of] the appearance of the Court as a body not swayed by external influence") (internal quotations and citations omitted).[1]

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[1] Contrary to the government's suggestion, this case is unlike *Greer* v. *Spock*, 424 U.S. 828 (1976) (sidewalk inside a military base) or *Adderley* v. *Florida*, 385 U.S. 39 (1966) (prison grounds), where the "forum" in question was devoted solely to government business, and the speech in question threatened to interfere with that business in a meaningful way.

There is no question that Congress can take steps to "protect[] the Supreme Court from the disruption of its work" (Opp. 7) and prevent harm or threatened harm to the Court and its personnel. Opp. 11 n.8. Such interests, however, are not implicated in this case. There are statutes that specifically address such problems, see, *e.g.*, 18 U.S.C. § 1507 (picketing or parading to interfere with court business); 40 U.S.C. § 13j (use of "loud, threatening, or abusive language"), and Section 13k presumably could be construed to reach only those "processions" that are disruptive to the Court. The application of the statute to petitioners, however, has not been and could not be defended by the United States on the ground that petitioners were in any way noisy, disruptive, threatening or an interference with the business of the Court. To, the contrary, both courts below placed primary reliance upon the government's interest in avoiding the "appearance of the Court as a body not swayed by external influence" in upholding the application of Section 13k to petitioners, in the face of their First Amendment challenge. See Pet. App. 11a-13a, 20a-22a, 34a-35a, 43a.

The United States, however, fails to address petitioners' point that a "concern for sheltering and insulating the judiciary from the appearance of political influence" (Pet. App. 21a) can only be implicated by examining the *content* of the speech to determine if it gives rise to that "appearance." Pet. 15-18. The United States argues that the restriction on speech embodied in Section 13k is "viewpoint-neutral" because Section 13k is applicable to speech regardless of whether it praises or criticizes a decision of the Court. Opp. 8 & 11 n.8 (Section 13k does not discriminate "among particular viewpoints" or lead to prosecution "because the government disagrees with the view they were attempting to [ex]press"); see Opp. 11 ("Section 13k applies in an even-handed manner regardless of the underlying subject matter or viewpoint of the demonstration"). Thus, the United States submits that the restriction is "content-neutral" because the "government is not concerned with whether the public will be swayed by the primary message the demonstrators seek to convey, but, instead, with the 'secondary effects' of demonstrations on Court grounds—that is, the creation of the appearance that the Court is influenced by public pressures in deciding cases." Opp. 10-11.

With respect to the United States' argument that Section 13k is viewpoint-neutral, it is well-established that a speech restriction may be viewpoint-neutral without being "content-neutral." *Boos* v. *Barry*, 485 U.S. 312, 319 (1988). "Content neutral" speech restrictions are those that "are *justified* without reference to the content of the regulated speech." *Id.* at 320 (quoting *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (emphasis in original); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 782 (1989). There is no question that the justification for Section 13k—*i.e.*, avoidance of the improper "appearance" that

may be created by certain speech—*necessarily* refers to the content of the prohibited speech.[2]

Thus, it is irrelevant whether the statute would be applied to prohibit positive as well as negative "views of the Court or the Court's decisions" (Opp. 11 n.8), and the critical point is that the statute "is justified *only* by reference to the content of [the] speech." *Boos*, 485 U.S. at 321. The government's effort to characterize the protection of public perception as a permissible "secondary effect[]" of a restriction on speech (Opp. 11) is misplaced because "[l]isteners' reactions to speech are not the type of 'secondary effects'" that properly may be addressed in an otherwise content-neutral statute. *Boos*, 485 U.S. at 321. Given the asserted justification for Section 13k, the restriction on speech should have been upheld only if the government sustained its burden of demonstrating that the restriction "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Neither court below even addressed whether Section 13k could meet this exacting standard.

Finally—regardless of the applicable standards, it is at least unclear how the plaza could be distinguished from the sidewalk in terms of protecting the public's perceptions, and this Court in *Grace* unanimously rejected such government interests as inadequate to sustain the constitutionality of a similar ban on expressive activity. At the very least, this Court's analysis in *Grace* casts doubt upon the United States' assertion that First Amendment activity on the plaza can be restricted in the manner set out in Section 13k, and review by this Court is therefore warranted.

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[2] The only speech that arguably can "create the impression that the Court is subject to influence by public demonstrations" (Opp. 11 n.8) is speech that says something about the content of this Court's decisions.

3. Petitioners have challenged as impermissibly vague the "narrowing construction" of the assemblage clause of Section 13k adopted by the courts below, "confining the scope of the clause to," *inter alia*, "the maintenance of proper order and decorum" and the preservation of "the appearance of the Court as a body not swayed by external influence." Pet. App. 20a. The United States, in its brief in opposition, does not dispute that the statute on its face is overbroad and that the narrowing construction adopted by the courts below was necessary. Opp. 4, 11-12; see Pet. App. 19a ("On its face, the congregation clause, which prohibits parading, standing, and moving in processions and assemblages" constitutes "an absolute ban on any group activity . . . not supported by the government's legitimate and important interests").

The United States argues, however, that Section 13k, as narrowed by the courts below, "is reasonably clear with regard to the conduct it reaches." Opp. 11. Without further explanation, the government asserts that the determination "whether persons engaged in a demonstration" constitute a threat to "decorum" or to the Court's appearance as a body removed from public opinion "is a sufficiently objective matter that the public and the officers charged with the statute's enforcement can determine with reasonable confidence what conduct is forbidden." Opp. 12.

Petitioners submit that Section 13k is not nearly so clear as the United States contends. It is not clear, for example, why petitioners' assembly for quiet prayer disturbed the "decorum" of the Court or its "appearance . . . as a body not swayed by external influence" (Pet. App. 20a) more than the familiar practice of attorneys assembling on the plaza following an oral argument to address supporters and the media. See Pet. App. 11a-12a. Indeed, the court below suggested that one (of two) "readily identifiable" "government concern[s] underlying Section 13k" was the prevention of the "use of [the plaza] as a

forum for voicing private views." Pet. App. 21a. There is no question that those attorneys who have used the plaza to share with the public and the media their views of a case or an argument are "voicing private views." Moreover, it is difficult to imagine that such speeches—particularly when made by a respected attorney (*e.g.*, an official of the NAACP, or even the Attorney General of the United States)—are any *less* likely to cause the public to perceive the Supreme Court as susceptible to outside influence than the conduct of petitioners in this case.

The simple fact is that the use of the plaza by attorneys and others to voice their "private views" on matters related to this Court is indistinguishable from the conduct of petitioners by any "objective standards." Indeed, the standards of "decorum" and "appearance" are so vague that virtually no objective standards exist. The absence of such objective standards "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). At the end of the day, only this Court can ultimately decide what type of speech is permissible in the area surrounding the building it occupies. For that reason alone, final review of these criminal convictions by this Court is appropriate.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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